

No. 91-535-CFX
Status: GRANTED

Title: Alan B. Burdick, Petitioner
v.
Morris Takushi, Director of Elections of Hawaii, et
al.

Docketed:

September 25, 1991 Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Eisenberg, Arthur N.

Counsel for respondent: Michaels, Steven S., Watanabe, Corinne
K.A.

NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Sep 25 1991	G	Petition for writ of certiorari filed.
3	Oct 10 1991		Order extending time to file response to petition until November 15, 1991.
4	Oct 15 1991		Order further extending time to file response to petition until November 15, 1991.
5	Nov 1 1991		Brief amici curiae of Eugene McCarthy, et al. filed.
7	Nov 15 1991		Brief of respondents Morris Takushi, et al. in opposition filed.
6	Nov 20 1991		DISTRIBUTED. December 6, 1991
8	Nov 25 1991	X	Reply brief of petitioner Alan Burdick filed.
9	Dec 9 1991		Petition GRANTED. *****
10	Jan 22 1992		Brief amici curiae of Andre Marrou, et al. filed.
11	Jan 22 1992		Brief amicus curiae of Hawaii Libertarian Party filed.
14	Jan 22 1992	X	Brief amicus curiae of Socialist Workers Party filed.
12	Jan 23 1992		Joint appendix filed.
		*	Joint Appendix in two volumes.
13	Jan 23 1992		* Joint Appendix in two volumes.
15	Jan 23 1992		Brief amicus curiae of Common Cause / Hawaii filed.
16	Jan 23 1992		Brief of petitioner Alan Burdick filed.
20	Feb 5 1992		SET FOR ARGUMENT TUESDAY, MARCH 24, 1991. (1ST CASE).
17	Feb 12 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals, Ninth Circuit. (1 Box)
18	Feb 12 1992		Record filed.
		*	Original proceedings U.S. District Court, District of Hawaii (1 Box)
19	Feb 21 1992		CIRCULATED.
22	Mar 2 1992	X	Brief of respondents Morris Takushi, et al. filed.
21	Mar 3 1992	X	Brief amici curiae of Arizona, et al. filed.
23	Mar 13 1992	X	Reply brief of petitioner Alan Burdick filed.
24	Mar 17 1992		Record filed.
		*	LODGING by respondents. 1 copy of publication: Results of Votes Cast: Primary Election.
25	Mar 24 1992		ARGUED.

91-535

No. 91-_____

Supreme Court, U.S.

FILED

SEP 25 1991

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Gov-
ernor of Hawaii; BENJAMIN
CAYETANO, in his capacity
as Lieutenant Governor of
the State of Hawaii,

Respondents.

**PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Mary Blaine Johnston
90 Central Avenue
Wailuki, Maui, Hawaii 96793
(808) 244-8750

Alan B. Burdick
820 Mililani Street
Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

QUESTION PRESENTED

Whether Hawaii's blanket prohibition against write-in voting in all general and primary elections unreasonably and unjustifiably denies its citizens the right to express their support for candidates of their own choosing and to participate fully and freely in the electoral process, as guaranteed by the United States Constitution.

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
Proceedings Below	4
REASONS FOR GRANTING THE WRIT	9
I. THE DECISION OF THE NINTH CIRCUIT, UPHOLDING HA- WAI'S TOTAL BAN ON WRITE- IN VOTING, IS IN CONFLICT WITH A RECENT RULING OF THE FOURTH CIRCUIT	9
II. THE NINTH CIRCUIT MISCON- STRUED AND MISAPPLIED THE STANDARD SET FORTH BY THIS COURT IN ANDERSON v. CELEBREZZE	15
III. THIS CASE RAISES SIGNIFI- CANT PRACTICAL AS WELL AS CONCEPTUAL QUESTIONS RE- GARDING THE NATURE AND SCOPE OF THE FUNDA- MENTAL RIGHT OF ELEC- TORAL PARTICIPATION	20

	<i>Page</i>
CONCLUSION	24
APPENDIX	1a
Order and Opinion of the Court of Appeals, June 28, 1991	1a
Opinion of the Court of Appeals, March 1, 1991	18a
Opinion and Order of the District Court, May 10, 1990	32a
Opinion of the Hawaii Supreme Court, July 21, 1989	52a
Order of the District Court, July 19, 1988	56a
Amended Certification from the District Court to the Hawaii Supreme Court, August 9, 1988	58a
Opinion of the Court of Appeals, May 17, 1988	61a
Opinion and Order of the District Court, September 29, 1986	67a
Constitutional and Statutory Provisions	78a

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	<i>passim</i>
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	16
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	15
<i>Canaan v. Abdelnour</i> , 710 P.2d 268 (Cal. 1985)	14
<i>Carrington v. Rash</i> , 380 U.S. 89 (1965)	16
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	15
<i>Cole v. Tucker</i> , 41 N.E. 681 (Mass. 1985)	14
<i>Dixon v. Maryland State Administra- tive Board of Election Laws</i> , 878 F.2d 776 (4th Cir. 1989)	8, 9, 10, 11, 13, 14
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	15, 16
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989)	13, 15, 16
<i>Grogan v. Graves</i> , Civ. 90-2378-0 (U.S. Dist. Ct., D.Kans. 1990)	14
<i>Hopper v. Britt</i> , 96 N.E. 371 (N.Y. 1911)	14

	<i>Page</i>
<i>Illinois State Board of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979)	11, 12, 15
<i>Jackson v. Norris</i> , 195 A.576 (Md. 1937)	14
<i>Kramer v. Union Free School District</i> , 395 U.S. 621 (1969)	16
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	15
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	22
<i>Paul v. Indiana</i> , 743 F.Supp. 616 (S.D.Ind. 1990)	13, 14
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	23
<i>Snortum v. Homme</i> , 119 N.W. 59 (Minn. 1909)	14
<i>Socialist Labor Party v. Rhodes</i> , 290 F.Supp. 983 (S.D. Ohio)	14
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	16, 18
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	11, 12, 16, 18, 22

Statutes and Regulations

42 U.S.C. §1973ff-2	14
42 U.S.C. §1983	5

	<i>Page</i>
Haw. Rev. Stat. §11-2	5
Haw. Rev. Stat. §11-62	20, 22
Haw. Rev. Stat. §12-5	20
Haw. Rev. Stat. §12-31	18, 21
Haw. Rev. Stat. §12-41	21
Haw. Rev. Stat. §12-42	19
Nev. Rev. Stat. §24-293.270(2)	13
Okla Stat. Tit. 26 §7-127(1)	13
S.D. Codified Laws Ann. §12-16-1	13

Other Authorities

Gunther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv.L.Rev. 1 (1972)	15
Note, "First Amendment -- Voters' Speech Rights," 104 Harv.L.Rev. 657 (1990)	13
Reynolds and McCormick, "Outlawing 'Treachery': Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910," 72 The Journal of American History 835 (March 1986)	11

No. 91-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

v.

MORRIS TAKUSHI, Director of
Elections, State of Hawaii; JOHN
WAIHEE, Lieutenant Governor of
Hawaii; BENJAMIN CAYETANO,
in his capacity as Lieutenant Gover-
nor of the State of Hawaii,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Alan B. Burdick respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Ninth Circuit on June 28, 1991.

OPINIONS BELOW

The June 28, 1991 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 937

F.2d 415 (9th Cir. 1991), and is set forth in the Appendix to this Petition at 1a-17a. The March 1, 1991 opinion of the Ninth Circuit which was withdrawn and superseded by the June 28, 1991 opinion is reported at 927 F.2d 469 (9th Cir. 1991), and is set forth in the Appendix to this Petition at 18a-31a.

The opinion and order of the United States District Court for the District of Hawaii, dated May 10, 1990, granting plaintiff's motion for summary judgment and permanent injunctive relief is reported at 737 F.Supp. 582 (D.Haw. 1990), and is set forth in the Appendix to this Petition at 32a-51a.

The opinion of the Hawaii Supreme Court, dated July 21, 1989, in response to certified questions from the United States District Court is reported at 776 P.2d 824 (1989), and is set forth in the Appendix to this Petition at 52a-55a.

The July 19, 1988 order certifying questions of Hawaii law to the Supreme Court of Hawaii is unreported. It is set forth in the Appendix to this Petition at 56a-57a. The August 9, 1988 Amended Certification from the United States District Court for the District of Hawaii to the Hawaii Supreme Court is set forth in the Appendix to this Petition at 58a-60a. The May 17, 1988 decision of the United States Court of Appeals for the Ninth Circuit is reported at 846 F.2d 587 (9th Cir. 1988), and is set forth in the Appendix to this Petition at 61a-66a. The decision, order and opinion of the district court, dated September 29, 1986, granting plaintiff's motion for summary judgment and injunctive relief is unreported. It is set forth in the Appendix to this Petition at 67a-77a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered an opinion and judgment in this case on

March 1, 1991. A timely petition for rehearing along with a suggestion for rehearing *en banc* was submitted to the court of appeals. On June 28, 1991, the court of appeals withdrew its March 1, 1991 opinion; denied the petition for rehearing; rejected the suggestion for rehearing *en banc*; and entered a new opinion and judgment. This petition for a writ of *certiorari* is taken from the June 28, 1991 opinion and judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Hawaii Revised Statutes §§12-1, 12-2, 12-41, 16-1, 16-22, and 16-26, are set forth in the Appendix to this Petition at 78a-81a.

STATEMENT OF THE CASE

This case involves the most basic of all constitutional liberties -- the right of citizens to vote for the candidates of their choice. Specifically, Hawaii state officials have interpreted the Hawaii election laws as prohibiting individuals from submitting write-in ballots in primary and general elections held for state and federal offices. And, in so doing, Hawaii officials deprive citizens of the right to express their dissatisfaction with the range of choices presented on the ballot and to vote, instead, for candidates of their own personal preference. At issue in this case is whether Hawaii's prohibition against write-in voting can withstand serious judicial scrutiny as required by the federal Constitution.

Petitioner Alan B. Burdick is and has been throughout the life of this litigation a resident and registered voter in the City and County of Honolulu, Hawaii. In

recent years, petitioner frequently found himself dissatisfied with the choice of candidates appearing on the ballot. All too often he found that none of the candidates listed on the ballot represented his views or shared his positions with respect to significant public policy matters. Accordingly, in June, 1986, petitioner notified Hawaii election officials that he wanted to cast write-in votes in the then upcoming primary and general elections. The election officials responded to Burdick's inquiry by informing him that Hawaii law does not explicitly provide for write-in voting and that, consequently, were he to try to execute a write-in ballot, it would not be counted. R.A.257.¹

Subsequently, Hawaii election officials provided Burdick with a copy of an opinion letter, dated July 11, 1986, issued by the Attorney General's Office. This opinion letter rested upon the premise that the Hawaii election law contained no provision requiring that write-in voting be permitted. The letter went on to conclude that neither the legislature nor Hawaii election officials were required, as a matter of constitutional principle, to permit write-in votes. R.A.261-62. Burdick was especially concerned about this interpretation of the Hawaii election law because, in 1986, the state house of representatives election held in the district in which Burdick lived and voted featured only one candidate, running unopposed. And Burdick had no interest in voting for that candidate. R.A.257.

Proceedings Below

Petitioner filed suit in August, 1986 in the United States District Court, District of Hawaii. He named as defendants Morris Takushi and John Waihee who, at the time of the commencement of the action, were Hawaii's

¹ References preceded by "R.A." are to portions of the record as set forth in Appellants' Excerpts of Record filed in the Ninth Circuit.

Director of Elections and Lieutenant Governor² respectively. The suit, seeking declaratory and injunctive relief and attorneys' fees, was commenced pursuant to 42 U.S.C. §1983. It alleged that defendants' denial of petitioner's right to cast a write-in ballot for the representatives of his choice violated the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that it violated, as well, the Hawaii Constitution.

The district court held that Hawaii's refusal to permit write-in voting constituted a violation of petitioner's freedom of expression and association. Accordingly, the district court issued injunctive relief directing Hawaii to provide for the casting and counting of write-in votes in the November, 1986 elections. 67a-78a. The state moved in the district court for a stay of the injunction pending appeal and the motion was denied.

An appeal was taken to the Court of Appeals for the Ninth Circuit, which stayed the injunction pending disposition of the appeal. On May 17, 1988,³ the Ninth Circuit reversed and directed the district court to abstain -- under the *Pullman* abstention doctrine -- from reaching the federal constitutional questions on the ground that the case raised outstanding questions of state law that needed to be resolved preliminarily. 846 F.2d 587 (9th

² Under Hawaii law the Lieutenant Governor is responsible for the conduct of elections for state and federal offices. Haw. Rev. Stat. §11-2.

³ Fearing that the Ninth Circuit might not decide the appeal prior to the September, 1988 primary election, Burdick filed a second suit entitled *Burdick v. Cayetano*, Civil No. 88-0365, seeking relief in connection with the then forthcoming 1988 elections. Burdick filed the second suit on May 17, 1988 unaware that, on that same day, the Ninth Circuit had decided the appeal in the first suit. The two actions were later consolidated at the district court and on appeal. This petition for a writ of *certiorari* is taken from the June 28, 1991 decision of the Ninth Circuit in the consolidated appeal.

Cir. 1988).

On remand, the district court certified three questions to the Hawaii Supreme Court. 56a-57a, 58-60a. The questions, involving interpretations of state law and the state constitution, were as follows:

- (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

In an opinion issued July 21, 1989, the Hawaii Supreme Court answered each of the certified questions in the negative concluding that Hawaii law prohibited write-in voting and that such a prohibition was entirely consistent with the Hawaii Constitution. 776 P.2d 824, 825 (Haw. 1989). 52a-55a.

Burdick thereupon renewed his motion for summary judgment in the federal district court. On May 10, 1990, the district court again held that Hawaii's prohibition against write-in voting violated the federal Constitution. And, the district court again issued injunctive relief directing state officials to permit the casting and counting of write-in ballots. But, on this occasion, the district court stayed its mandate pending appeal. 737 F.Supp. 582 (D.Haw. 1990). 32a-51a.

On appeal, the Ninth Circuit reversed in an opinion issued March 1, 1991. 18a-31a. Burdick petitioned for rehearing with a suggestion of rehearing *en banc*. On June 28, 1991, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. But, the court of appeals also withdrew its March 1, 1991 opinion and issued a new opinion which, nonetheless, reversed the district court's decision granting plaintiff's motion for summary judgment and injunctive relief. 1a-17a.

In reversing the district court's decision, the Ninth Circuit found that Hawaii's restriction on write-in voting did not constitute a substantial burden on Burdick's right to vote. In this regard, the court below concluded: "Although Burdick is guaranteed an equal voice in the election of those who govern, Burdick does not have an unlimited right to vote for any particular candidate." 10a. The court further concluded that Hawaii's restriction imposed no substantial burden upon Burdick's right of political expression. The court reasoned that if, by executing a write-in ballot, Burdick simply sought to express his disapproval of the candidates whose names appeared on the ballot, petitioner had "ample alternative channels" by which to communicate his views. 11a.

The Ninth Circuit went on to evaluate the justifications advanced by the state in support of its restrictive policy. The court found, first, that the prohibition against write-in voting advanced the state's interest in "political stability" by "ensuring that sore losers do not sidestep the ballot access requirements and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting." 13a. The court of appeals also found that the "prohibition on write-in voting serve[d] [the] interest [in an informed electorate] by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidate's positions and qualifications." *Id.* Finally, the Ninth Cir-

cuit observed that, under Hawaii law, a candidate who was unopposed after a primary election would be seated without running in the general election and that the prohibition against write-in voting "ensures that a candidate 'seated' after the primary is not challenged in the general election by a write-in candidate." 14a.

In reaching these conclusions, the Ninth Circuit expressly recognized that its decision was inconsistent with that rendered by the Fourth Circuit in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989), thereby creating a conflict between the circuits. 14a. The Ninth Circuit decision also placed Hawaii out of step with most other jurisdictions in this country that permit write-in voting, at least in general elections. And it is at odds with the judicial decisions of the highest courts in many of those jurisdictions that have interpreted write-in voting as constitutionally required. See *infra* n.9.

As discussed in Point I below, these conflicts provide a substantial reason for granting *certiorari* review in this case. Review should also be granted because the Ninth Circuit ignored this Court's jurisprudence respecting the constitutional right of electoral participation and seriously misapplied the analysis set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Finally, *certiorari* should be granted because this case raises significant practical as well as conceptual questions regarding the nature and scope of the fundamental right of electoral participation, encompassing as it does the correlative rights of political association and expression within the electoral process. Each of these matters will be addressed below.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT, UPHOLDING HAWAII'S TOTAL BAN ON WRITE-IN VOTING, IS IN CONFLICT WITH A RECENT RULING OF THE FOURTH CIRCUIT

As the Ninth Circuit plainly acknowledged, its decision in this case is inconsistent with the Fourth Circuit's recent decision in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776. In *Dixon*, the court of appeals invalidated statutory provisions that required persons seeking office in Baltimore, by means of write-in voting, to pay a \$150 filing fee in order to have their votes included in the official tally. The Fourth Circuit held that such a requirement impermissibly and unjustifiably diminished constitutional rights of electoral participation and expression. *Id.* at 781.⁴

In reaching this conclusion the Fourth Circuit adopted a far broader and more enduring and realistic conception of the constitutional right of electoral participation than that held by the Ninth Circuit. In essence, the Ninth Circuit regarded the constitutionally protected right to vote as one entailing little more than a right to choose equally with all other citizens among the candidates presented on the ballot. 10a.⁵ The Ninth Circuit

⁴ The statute at issue in *Dixon* was not nearly as restrictive of write-in voting as the policy at issue in this case. Nevertheless, the Fourth Circuit found the Maryland law violative of constitutional rights of free expression and voting while the Ninth Circuit, in this case, has upheld a substantially more restrictive policy and rejected the same constitutional claims relied on by the Fourth Circuit. In their reasoning and analysis the Fourth Circuit and Ninth Circuit are in direct conflict.

⁵ In this regard, the Ninth Circuit conception of the constitutional right to vote is so constricted that it does not embrace a right to execute a write-in ballot even where only one name appears on the state-prepared ballot. So understood, the Ninth Circuit would not be of-

(continued...)

acknowledged no constitutionally protected interest in using one's vote as a means of political expression or as a means of associating with others to advance a dissenting point of view. Accordingly, the Ninth Circuit concluded that Hawaii's prohibition against write-in voting "does not place any substantial burden on [plaintiff's] fundamental right to participate equally in the election of those who will make or administer the laws." 12a. Adopting a narrow view of the constitutional interests implicated in the exercise of the franchise, the Ninth Circuit seriously undervalued the burden on electoral participation posed by the policy at issue here. The court below then compounded its error by accepting, without serious scrutiny, the proffered justifications advanced by the state in support of its restrictive policy. See further discussion, *infra*, Point II.

In contrast, the Fourth Circuit in *Dixon* recognized the important elements of political expression and association that coalesce around electoral campaigns. The Fourth Circuit stressed that the electoral process serves as a vehicle for political expression while, at the same time, it provides a mechanism for selecting representatives. So understood, the Constitution protects the candidate-choosing aspect as well as the political expression component to the casting of a ballot. Moreover, the *Dixon* court further recognized that rights of electoral expression do not become less protected when used to convey dissent or to support a candidate outside the political mainstream:

⁵ (...continued)

fended by the electoral scheme that once prevailed in the Soviet Union where only Communist Party candidates appeared on the ballot and where the voters were told that they could vote for the names appearing on the ballot and for no other candidates. Under the Ninth Circuit's view such a scheme would not violate the U.S. Constitution because all voters had an "equal right" to vote for the candidates appearing on the ballot.

It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable.

Dixon, 878 F.2d at 782. Voters who are dissatisfied with the existing field of candidates may cast votes for write-in candidates, the Fourth Circuit concluded, "in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence. Our system of government accords the expression of this hope the status of a protected right." *Id.*

The Fourth Circuit's conception of the multifaceted nature of the constitutional right of electoral participation is well supported by decisions of this Court. In *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), this Court made clear that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." In essence, *Williams* and its progeny properly recognized that when the state prepares the ballot⁶ and, in so doing, restricts the number of names appearing on the ballot, it necessarily limits voters' freedom of choice in a serious way. *Anderson v. Celebrezze*, 460 U.S. at 787; *Illinois State Board of Elections v. Socialist Workers*

⁶ The system of state-prepared ballots, commonly described as the "Australian" ballot system, was only introduced into this country toward the close of the Nineteenth Century. Prior to that time, voters could vote by including any names they wanted on the ballots that they deposited in the ballot box. Reynolds and McCormick, "Outlawing 'Treachery': Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910," 72 *The Journal of American History* 835, 844 (March 1986).

Party, 440 U.S. 173, 184 (1979).

Moreover, this Court has further recognized that the right to vote and to participate meaningfully in the electoral process extends well beyond the act of choosing among the candidates whose names appear on the ballot. The constitutional right of electoral participation includes the right to associate with like-minded individuals in support of a candidate, to campaign for that candidate and to express one's support for a candidate and for the ideas that that candidate represents. *Anderson v. Celebrezze*, 460 U.S. at 788.

Finally, this Court has observed that the amalgam of interests encompassed within the right of electoral participation also includes using an election campaign as "a means of disseminating ideas as well as attaining political office." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 186. And in this regard, the casting of a ballot is not merely a vehicle for registering one's vote for one of the listed candidates, but its most effective use may very well be to register a protest against all of the listed candidates. To the voter unhappy with the choices on the ballot, it is meaningless to cast his or her vote along with thousands of others for "the lesser of two evils." This is especially the case when a write-in vote -- perhaps accompanied by a handful or a large number of others -- will carry a message, loud and clear, that all the candidates on the ballot are unacceptable. As Justice Harlan observed in a concurring opinion in *Williams v. Rhodes*, 393 U.S. at 41: "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political participation."

Thus, when the names on a election ballot leave many citizens with no opportunity to express strongly held ideological positions, the right of such citizens to cast a meaningful vote is nullified. For a voter's opportunity to cast a ballot has little significance if there is no

candidate standing for his or her interests. For this reason, as well, the Fourth Circuit correctly understood that the constitutional right of electoral participation embraces a right to use the franchise to express one's dissatisfaction with all of the candidates listed on the ballot. And consistent with such an understanding, the *Dixon* court seriously evaluated Baltimore's write-in restrictions, finding that they failed to 'serve[] a compelling governmental interest . . . and [were not] narrowly tailored to serve [any such] interest.'" 878 F.2d at 780, quoting *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989).

Clearly, the two circuits are fundamentally split in their understanding of the nature and extent of the right of electoral participation and of the nature of the scrutiny to be applied to laws restricting this right. Such differences between the circuits render it important for this Court to examine the issue and to clarify the constitutional standards that pertain in controversies such as this.

Moreover, the Ninth Circuit decision in this case is not only inconsistent with that of the Fourth Circuit, it also places Hawaii at odds with practices in most⁷ other jurisdictions and it is inconsistent with the constitutional-

⁷ A 1990 note on this case and on *Paul v. Indiana*, 743 F.Supp. 616 (S.D.Ind. 1990), identified three states, in addition to Hawaii, that impose a complete ban on write-in voting. Note, "First Amendment -- Voters' Speech Rights," 104 Harv.L.Rev. 657, 662 n.44 (1990). Those three states are Nevada (Nev. Rev. Stat. §24-293.270(2)(1987)); Oklahoma (Okla Stat. Tit. 26 §7-127(1)(Supp. 1989)); and South Dakota (S.D. Codified Laws Ann. §12-16-1 (1982 & Supp. 1990)).

The note further identified eight states that permit write-in voting in general elections but prohibit such voting in primary elections. See 104 Harv.L.Rev. at 662 n.45. And the note identified "at least 16 states [that] require some form of pre-registration by write-in candidates." See *id.* at 663 n.47. The remaining states apparently permit write-in voting in primary as well as general elections without significant limitation.

ly based decisions of the highest courts in many of those jurisdictions.⁸ Indeed, there has developed a deep and longstanding tradition among state courts upholding write-in voting.⁹ Prior to the Ninth Circuit decision in this case, a smaller body of federal court rulings had also pointed decidedly in favor of a constitutionally protected right to cast a write-in ballot.¹⁰ The decision of the Ninth Circuit conflicts with that tradition. For this reason, as well, review should be granted in this case.

⁸ A few of these state courts -- most notably the Supreme Court of California in *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) -- have held that the right to cast a write-in ballot is protected by both the federal and state constitutions. A larger number of state courts have relied exclusively on their own state constitutions in upholding write-in voting.

Indeed, shortly after the "Australian" ballot was introduced into this country, a number of state courts reviewed the constitutionality of the new reform. In so doing, such courts typically upheld the "Australian" ballot system only upon the condition that write-in voting was permitted. This development was summarized by the Supreme Judicial Court of Massachusetts in *Cole v. Tucker*, 41 N.E. 681 (Mass. 1985); see also *Jackson v. Norris*, 195 A.576 (Md. 1937); *Snortum v. Homme*, 119 N.W. 59 (Minn. 1909); *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911).

⁹ Many state courts have held that the prohibition against write-in voting contravenes the state constitutions. But, as the California Supreme Court also noted in *Canaan v. Abdelnour*, 710 P.2d at 282 n.22, "courts have construed statutes which were silent on the issue to allow write-in voting to avoid constitutional difficulties" and still others "have expressed in dicta that voters have the right to write-in the candidates of their choice."

¹⁰ In addition to *Dixon*, federal courts conferred constitutional protection on write-in ballots in *Paul v. Indiana*, 743 F.Supp. 616; *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983, 990 (S.D. Ohio), *aff'd in part and modified in part sub nom. Williams v. Rhodes*, 393 U.S. 23 (1968); and in *Grogan v. Graves*, Civ. 90-2378-0 (U.S. Dist. Ct., D.Kans. 1990) (unreported opinion).

Moreover, Congress, by statute, permits citizens living abroad to cast absentee ballots for candidates seeking federal office and, in so doing, to write-in the candidates of their choice. 42 U.S.C. § 1973ff-2.

II. THE NINTH CIRCUIT MISCONSTRUED AND MISAPPLIED THE STANDARD SET FORTH BY THIS COURT IN *ANDERSON v. CELEBREZZE*

In *Anderson v. Celebrezze*, 460 U.S. 780, this Court articulated a broad methodology of analysis for dealing with cases involving the constitutional right of electoral participation.¹¹ Thus, the *Anderson* Court observed that a court called upon to review a statute or policy restricting electoral participation,

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all

¹¹ Prior to *Anderson*, this Court had applied a variety of seemingly different analytic standards in reviewing statutes and policies that burdened rights of electoral participation. Compare, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972), with *Bullock v. Carter*, 405 U.S. 134 (1972), with *Clements v. Fashing*, 457 U.S. 957 (1982), and *Mandel v. Bradley*, 432 U.S. 173 (1977).

The *Anderson* Court expressed dissatisfaction with "litmus-paper" tests. 480 U.S. at 789. See also Justice Stevens' concurring opinion in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. at 233, and Justice Blackmun's concurring opinion in *Illinois Board of Elections v. Socialist Working Party*, 440 U.S. at 183-85. See also Gunther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv.L.Rev. 1 (1972). Accordingly, in *Anderson*, this Court seemingly attempted to reconcile the disparate analytic approaches and sought to fold them into an all-encompassing methodology of analysis.

these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789.

But, nothing in this analytic approach suggests that the *Anderson* Court intended to abandon more than two decades of doctrinal development that preceded it. Thus, under the *Anderson* approach, a court called upon to review a law that substantially burdens First Amendment rights of political participation must continue to demand a genuinely close fit between the law in question and the interests the law purports to advance. It must continue to demand that the statute in question be narrowly tailored in the pursuit of compelling governmental interests.¹² This point was made clear in post-*Anderson* cases like *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Committee*, 489 U.S. 214. And, even where the magnitude of the asserted constitutional injury does not seem great, the *Anderson* standard requires that where a state restricts political participation it must demonstrate that the restrictions are "necessary" to advance important societal interests -- interests that are real and not simply "theoretically imaginable." *Williams*

¹² This is especially true where, as here, a policy expressly limits the right to vote and the right to express one's views in connection with an electoral contest. Of the variety of ways in which citizens engage in electoral participation, this Court has been most careful to protect the right to vote and the right of political expression against unnecessary limitations by states. Accordingly, this Court has typically imposed the most stringent level of judicial scrutiny upon laws that have substantially abridged the fundamental right to vote. See *Dunn v. Blumstein*, 405 U.S. 330; *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965). Similarly, this Court has strictly scrutinized laws that have been found to burden rights of political expression. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214.

v. Rhodes, 393 U.S. at 33.

The opinion below purported to apply the analytic method articulated by this Court in *Anderson*. In so doing, however, the Ninth Circuit entirely misconceived and misapplied the *Anderson* standard. As discussed in Point I above, the Ninth Circuit adopted a limited and constricted view of the constitutional right of electoral participation. And its narrow vision of the scope of the constitutional right allowed the court of appeals to conclude erroneously that "the fact that Burdick cannot cast a write-in vote does not place any substantial burden on his fundamental right to participate equally in the election of those who will make or administer the laws." 12a.

The Ninth Circuit compounded its error by casually accepting the state's proffered justification for its policy without ever genuinely asking whether the restriction on write-in voting was "necessary" to guarantee "political stability" or to ensure an "informed electorate" or to protect the "internal structure of [Hawaii's] election laws." 13a-14a. Had the court below seriously examined the state's putative interests, Hawaii's total prohibition of write-in voting could not have been sustained.

Hawaii argues that its write-in ban promotes "political stability" in two ways: first, by preventing "inter-party raiding"; second, by preventing "sore loser" candidacies. But a total prohibition against write-in voting cannot be found necessary to prevent either of these concerns. This is the case with respect to "inter-party raiding" for several reasons. First, "inter-party raiding"¹³ is a concern that is limited to primary elections. "Raiding" is never

¹³ Inter-party raiding is "the organized switching of blocks of votes from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S. at 788, n.9. This Court noted that it is "applicable only to party primaries." *Id.* at 801, n.29.

an issue in general elections. Therefore, Hawaii's total prohibition against write-in voting in general elections as well as in primary elections cannot be justified out of a concern for "inter-party raiding." Second, Hawaii has made clear that it does not regard "raiding" as a serious problem. For Hawaii permits "open" primaries.¹⁴ Where, as here, the state permits any voter to vote in any party's primary election it cannot then turn around and seriously claim that a restriction on write-in voting is "necessary" to prevent "raiding."

Similarly, Hawaii's total prohibition against write-in ballots cannot be justified upon the claim that such a restriction is necessary to prevent candidates who lose primary elections -- so called "sore loser" candidates -- from subsequently running as write-in candidates. Again, there are at least two reasons why this justification must be rejected. First, there is no evidence in the record of any serious effort by "sore losers" to mount a write-in campaign -- and, given the monumental odds against the success of any write-in candidate, it is highly unlikely that any "sore loser" would pursue such a strategy. In this regard, it is axiomatic that hypothesized, unrealistic concerns that are only "theoretically imaginable" cannot serve to justify unnecessary restrictions on the constitutional right of electoral participation. *Williams v. Rhodes*, 393 U.S. at 33. Second, if Hawaii were genuinely concerned about "sore losers" it could draft a prohibition against write-in voting that was narrowly tailored to that concern. It could prohibit the official recording of write-in ballots on behalf of "sore losers."

The claim that Hawaii's prohibition is necessary to ensure an informed electorate is also unpersuasive. For,

¹⁴ In Hawaii's open primary, all registered voters may choose in which party to vote. Haw. Rev. Stat. §12-31. For a description of the different types of "open" and "closed" primaries, see *Tashjian v. Republican Party of Connecticut*, 479 U.S. at 222, n.11.

again, it is unlikely in the extreme that a voter will go to the trouble to execute a write-in ballot for a candidate that he or she knows little or nothing about. Seen in these terms, this justification for Hawaii's prohibition against write-in voting is "highly paternalistic," just as this Court regarded California's ban on primary endorsements by political parties to be paternalistic when the state argued that such a prohibition was necessary to permit voters to make wise decisions unencumbered by the views of political parties. *Eu*, 489 U.S. at 223, 228.

Finally, Hawaii's interest in protecting the "internal structure of its election laws" by protecting primary victors who are running unopposed from being required to mount a campaign and run in the general election cannot serve as a basis for Hawaii's total prohibition against write-in ballots. This is so because Hawaii permits an unopposed primary victor to be automatically designated the victor in the general election only in connection with state legislative contests.¹⁵ Hawaii Const. art. III, §4. This provision does not apply in the vast majority of electoral contests held in Hawaii. Thus, a blanket prohibition against write-in voting that extends beyond this small number of offices where this provision applies cannot be justified as a basis for advancing this interest. The blanket prohibition simply sweeps too broadly.¹⁶

For all of these reasons, the Ninth Circuit seriously misapplied the *Anderson* model and upheld Hawaii's prohibition against write-in voting upon a casual acceptance of the state's proffered justifications for its restriction. *Certiorari* should be granted to correct the misconstruc-

¹⁵ Section 12-42 of the Hawaii Revised Statutes also permits the automatic designation of primary victors in connection with special elections.

¹⁶ Moreover, petitioner finds highly objectionable the practice of automatically designating an unopposed primary victor as an officeholder without requiring that candidate to run in the general election.

tion and misapplication of this Court's jurisprudence governing the constitutional right of electoral participation.

III. THIS CASE RAISES SIGNIFICANT PRACTICAL AS WELL AS CONCEPTUAL QUESTIONS REGARDING THE NATURE AND SCOPE OF THE FUNDAMENTAL RIGHT OF ELECTORAL PARTICIPATION

As indicated in Point I above, this case raises important conceptual questions regarding the nature of the constitutional right of electoral participation. It raises, as well, the question of whether this Court's voting rights jurisprudence is being properly understood and applied by the lower federal courts. See Point II above. In addition to these doctrinal and conceptual issues, however, this case also raises important practical questions for the voter in Hawaii.

Consider the voter who is dissatisfied with the choice of candidates running for statewide office. According to the Ninth Circuit, such a voter could try to organize a campaign around a preferred candidate on the assumption that "Hawaii election laws provide candidates with considerable ease of access to the ballot." 11a. In this regard, the Ninth Circuit observed that,

[u]nder Hawaii election laws a candidate for county office may gain access to the primary ballot by simply submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education may gain access with twenty-five signatures. Haw. Rev. Stat. §12-5 (1990 Supp.). Hawaii's election laws also provide for easy access to the ballot by a party. Haw. Rev. Stat. §11-62 (1988)(signatures of 1% of total

registered state voters as of last election).

Id. at n.2.

But, the Ninth's Circuit observations miss the mark in several respects. First, Hawaii is not a state in which independent candidates or minor parties can easily gain access to the general election ballot and thereby present a serious challenge to the political *status quo*. For, even if an independent candidate were to gain access to the primary ballot it will be quite difficult for such a candidate to move from the primary to the general election ballot. The reason for this is that, when a citizen of Hawaii enters the polling site on primary day, that citizen must choose to vote in either the Democratic, Republican or Libertarian primary election or, in the alternative, may choose to vote on a nonpartisan ballot consisting of the names of independent candidates. Haw. Rev. Stat. §12-31. Not surprisingly, very few voters choose the nonpartisan ballot. Nevertheless, Hawaii law requires that, to secure a place on the general election ballot, an independent candidate must obtain more than 10% of the vote cast for that office in the primary election.¹⁷ This requirement serves as a virtually insurmountable impediment to the general election ballot. It is thus apparent that, contrary to the suggestion of the Ninth Circuit, it is quite difficult for an independent candidate to gain access to the general election ballot in Hawaii.

It is similarly difficult for a minor party to gain access to the general election ballot. While the Ninth Circuit correctly noted that Hawaii requires petitions signed by only 1% of the total registered state voters for a new party to gain access to the ballot, the court of appeals ignored the fact Hawaii also requires that these petitions

¹⁷ A nonpartisan candidate will not be held to this 10% requirement in the unlikely circumstance that he or she attains a vote total that is equal to the vote total for the partisan candidate receiving the lowest number of votes for the same office. Haw. Rev. Stat. §12-41.

be filed 150 days (5 months) prior to the primary election. Haw. Rev. Stat. §11-62. This extraordinarily early filing deadline, again, makes Hawaii a state where access to the general election ballot is not easy.

Moreover, the Ninth Circuit observations regarding Hawaii's ballot access law miss the mark for another reason. For one can easily envision a voter who is dissatisfied with the choices appearing on the ballot who has no time or capacity to organize a campaign around a desired candidate. Such a voter simply wants to say "no" to the candidates listed on the ballot and perhaps to express an alternative preference.

One can well appreciate that a state-prepared ballot contains space for only a limited number of names and so a fair method must be developed for deciding whose name shall appear on the ballot. And, in *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), this Court recognized that states could limit rights of political participation where such limitations were genuinely necessary to prevent the creation of a ballot that would be confusing to the voter. But concerns about voter confusion cannot explain Hawaii's prohibition against write-in voting. The fact that Hawaii prepares the ballot cannot explain why it would choose, contrary to the practice and tradition in most states, to prohibit citizens from writing-in their own preferences in primary and general elections.

Representative democracy rests upon the "consent of the governed" and this "consent" is, in turn, obtained by permitting the people to choose their political leaders freely and fairly. Alexander Hamilton observed that the essence of representative government is "that the people should choose whom they please to govern them." 2 *Elliot's Debates* 257. In *Williams v. Rhodes*, 393 U.S. at 39, Justice Douglas similarly observed: "I would think that a state has precious little leeway in making it difficult or impossible for citizens to vote for whomever they please

...." And in *Powell v. McCormack*, Chief Justice Warren noted that representative democracy "is undermined as much by limiting whom the people can select as by limiting the franchise itself." 395 U.S. 486, 547 (1969).

Accordingly, our contemporary claim of commitment to democratic government has a hollow ring when election laws are drafted or interpreted in such a way as to deny citizens the widest possible freedom to choose among candidates seeking public office. We similarly dishonor that commitment to democratic values when we interpret our election laws in such a way as to deprive citizens unnecessarily of the right to express their dissatisfaction with all of the candidates appearing on the ballot and when we deny them the right to express their dissent by writing-in the candidates of their own choosing.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Mary Blaine Johnston
90 Central Avenue
Wailuku, Maui, Hawaii 96793
(808) 244-8750

Alan B. Burdick
820 Mililani Street
Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

Dated: September 25, 1991

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

		x
ALAN B. BURDICK,	:	Nos. 90-15873;
Plaintiff-Appellee,	:	90-15876
v.		
	:	D.C. No. CV-
	:	86-0582-HMF
MORRIS TAKUSHI, Director	:	
of Elections, State of Hawaii;	:	
JOHN WAIHEE, Lieutenant Gov-	:	
ernor of Hawaii; BENJAMIN	:	
CAYETANO, in his capacity	:	
as Lieutenant Governor of	:	
the State of Hawaii,	:	
Defendants-Appellants.	:	
		x
		x
ALAN B. BURDICK,	:	No. 90-15877
Plaintiff-Appellee,	:	
v.		
	:	D.C. No. CV-
	:	88-0365-HMF
BENJAMIN CAYETANO, in his	:	
capacity as Lieutenant Governor	:	
of the State of Hawaii; MORRIS	:	ORDER AND
TAKUSKI, Director of Elec-	:	OPINION
tions of the State of Hawaii,	:	
Defendants-Appellants.	:	
		x

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
November 5, 1990 - Honolulu, Hawaii

Filed March 1, 1991
Opinion Withdrawn June 28, 1991
Opinion Filed June 28, 1991

Before: Otto R. Skopil, Jr., Robert R. Beezer and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Constitutional Law

Reversing a district court grant of a preliminary injunction ordering Hawaii to provide for the casting and counting of write-in votes, the court of appeals held that Hawaii's failure to provide for write-in voting was not a violation of appellant's right of freedom of expression and association.

The district court ruled that Hawaii's lack of provision for the casting and counting of write-in votes in statewide general elections violated a Hawaii voter's rights under the first and fourteenth amendments. On a previous remand, the district court certified certain questions to the Hawaii Supreme Court. With a definitive ruling from the Hawaii Supreme Court that Hawaii's election laws prohibited write-in voting, Alan B. Burdick renewed his motion for summary judgment in the district court. The district court again ruled that Burdick's federally guaranteed rights of expression and association were impermissibly infringed by Hawaii's prohibition on write-in voting. The State of Hawaii appealed the district court's preliminary injunction directing the State to provide for the casting and counting of write-in votes.

[1] The court stated that the Supreme Court has

recognized that there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process. [2] However, the rights to cast one's vote effectively and to associate in the advancement of political beliefs are guaranteed by the first and fourteenth amendments, and the state may not burden these rights excessively. [3] Although Burdick is guaranteed an equal voice in the election of those who govern, Burdick did not have an unlimited right to vote for any particular candidate. [4] Because the right to vote is inextricably intertwined with the State's right to regulate the election process, in determining whether prohibition on write-in voting burdened the fundamental right of participating equally in the election of those who govern, the court looked at the Hawaii election law as a whole. [5] The court concluded that although the prohibition on write-in voting may limit Burdick's political speech, it did not restrict the alternative channels available to him for expressing his political views. [6] Similarly, because the prohibition on write-in voting is not based on the content or subject matter of a write-in vote but rather is applicable to all write-in votes, it is a content-neutral, time, place, or manner restriction. [7] Accordingly, Burdick's asserted right to vote for any candidate he chooses did not implicate fundamental constitutional protections.

[8] The prohibition on write-in voting served Hawaii's interest in political stability by ensuring that sore losers do not sidestep the ballot access requirements, and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting. [9] The prohibition also served Hawaii's interest in an informed electorate by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidates' positions and qualifications. [10] In addition, Hawaii's interest in protecting the integrity of its election process is a compelling interest. The prohibition on write-in voting ensures that a candidate "seated"

after the primary election is not challenged in the general election by a write-in candidate. Therefore, Hawaii's ban on write-in voting did not impermissibly infringe Burdick's constitutional rights of expression and association.

[11] The court declined to follow the Fourth Circuit's contrary conclusion. Hawaii's election laws do not affect the myriad of other avenues that are available for propagating one's views and increasing one's influence. [12] In addition, Burdick did not waive his rights to bring his federal claims before the federal district court, and the district court did not fail to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions.

COUNSEL

Steven S. Michaels, Deputy Attorney General, Honolulu, Hawaii, for the defendants-appellants.

Mary Blaine Johnson, Wailuku, Hawaii, for the plaintiff-appellee.

James M. Johnson, Senior Assistant Attorney General, Olympia, Washington, for the amicus curiae.

ORDER

The opinion filed on March 1, 1991, and cited at 927 F.2d 469 (9th Cir. 1991) is withdrawn. The attached opinion is ordered filed.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge has requested a vote on whether to rehear the matter en banc. A vote has

been taken, and has failed to receive a majority of votes in favor of en banc consideration. Fed.R. App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

BEEZER, Circuit Judge:

The district court ruled that Hawaii's lack of provision for the casting and counting of write-in votes in statewide general elections impermissibly infringed a Hawaii voter's rights of expression and association as protected by the first and fourteenth amendments. The district court issued a preliminary injunction ordering Hawaii to provide for the casting and counting of write-in votes and then stayed the injunction pending appeal. We reverse.

I

The facts in this case are undisputed. In June 1986, Alan Burdick notified the Director of Elections and the Lieutenant Governor (hereinafter collectively referred to as the "State"), that he wanted to cast write-in votes in the upcoming primary elections and in future elections. The State advised Burdick that its election laws did not provide for write-in voting and that any write-in votes would be ignored.

Burdick filed suit in federal court, claiming that the lack of provision for write-in voting violated both the Hawaii Constitution and the United States Constitution. The district court held that the failure to provide for write-in voting constituted a violation of Burdick's rights of freedom of expression and association. The court issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes in the November 1986 statewide elections. The State moved

for a stay of the preliminary injunction pending appeal, and the motion was denied.

The State appealed the district court's order and denial of stay, and we granted a stay pending appeal. On May 17, 1988, we reversed and directed the district court to abstain from reaching the federal constitutional issue under the *Pullman* abstention doctrine. See *Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988)("[A] definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitutional question . . .").

On remand, the district court certified the following three questions to the Hawaii Supreme Court:

- (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

On July 21, 1989, the Hawaii Supreme Court answered no to each question. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824, 825 (1989). With a definitive ruling from the Hawaii Supreme Court that Hawaii's election laws prohibited write-in voting, Burdick renewed his motion for summary judgment in the district court. On May 10, 1990, the district court again ruled that Hawaii's prohibition on write-in voting impermissibly infringed Burdick's federally guaranteed rights of expression and

association. The district court again issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes. See *Burdick v. Takushi*, 737 F.Supp. 582 (D. Haw. 1990).

Because a statewide general election was less than four months away, and because this court had granted a stay of the prior preliminary injunction, the district court granted the State's motion to stay the current preliminary injunction pending appeal. *Id.* at 592-593. The State timely appealed the district court's final order.

II

We have jurisdiction pursuant to 28 U.S.C. §1291. A grant of summary judgment is reviewed *de novo*. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990).

The State asserts that Burdick does not have standing to challenge Hawaii's general election laws. To support its assertion, the State points to the fact that Burdick cannot vote in some of the races affected by the preliminary injunction and the fact that he has failed to identify a particular candidate for whom he wants to cast his write-in vote. To have standing a party must show that:

"he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)(citations omitted).

Burdick has demonstrated that his rights as a voter to freedom of expression and association are threatened

by Hawaii's prohibition on write-in voting. Although an order striking down the prohibition on write-in voting may apply to races in which Burdick cannot vote, the State does not contend that there is any difference in the way that the prohibition applies to the various elections throughout the state. The prohibition is a general state-wide restriction that affects Burdick personally, and therefore he has standing to challenge it. See *Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989) (Hawaii voter has standing to challenge the whole of the State election laws creating ballot access restrictions).

III

[1] The Supreme Court has acknowledged that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," and that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (citations and internal quotation omitted). Furthermore, the Constitution specifically authorizes states to regulate: "The Time, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1. The Supreme Court has also recognized that "as a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

[2] A state's broad power to prescribe the time, place and manner of elections, however, "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). The rights to cast one's vote effectively and to associate for the advancement of political beliefs are guaranteed by the first and fourteenth

amendments, and the state may not burden these rights excessively. See *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

The questions presented by a challenge to a specific provision in a state's election laws cannot be resolved by applying a "litmus paper test," *Storer*, 415 U.S. at 730. There is no self-executing rule that is a substitute for the "hard judgments that must be made." *Id.* In *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983), the Supreme Court set forth an analytical process for making these hard judgments. A court must:

first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id.

We begin the *Anderson* analysis by determining the "character and magnitude" of the injury to Burdick's rights of expression and association. Burdick asserts that the prohibition on write-in voting impinges his right to vote for the candidate of his choice. He asserts that the right to vote for the candidate of one's choice is a fundamental right.

Article I §2 of the United States Constitution grants persons qualified to vote "a constitutional right to vote

and to have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Supreme Court has stated that:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Id.

[3] The fundamental nature of the right to vote is based on a citizen's right to have a voice in the selection of those who govern. Casting one's vote does not implicate fundamental rights in a vacuum. Fundamental rights are implicated as a part of the process through which citizens elect the people who make and administer the laws. Although Burdick is guaranteed an equal voice in the election of those who govern, Burdick does not have an unlimited right to vote for any particular candidate.

For example, Art. I §2 of the United States Constitution limits congressional candidates to persons twenty five and older with seven years citizenship, and Art. II §1 of the United States Constitution limits presidential candidates to natural born citizens thirty-five and older. Moreover, Art. II, §1 of the United States Constitution provides that a vote for the office of the President is for an Elector rather than for an individual presidential candidate. The Supreme Court has upheld numerous state restrictions on who may qualify to run for certain offices. See e.g., *Clements v. Fashing*, 457 U.S. 957 (1982)(incumbent Justice of the Peace denied right to seek election to state legislature, and state and county office holders deemed automatically resigned if they run for another elective office); *Storer*, 415 U.S. 724 (state can require candidate to sever affiliation with political

party one year prior to election in order to run as independent candidate); *American Party of Texas v. White*, 415 U.S. 767, 782 (1974)(state can deny place on ballot to frivolous candidate by requiring candidates to "demonstrate a significant, measurable quantum of community support").

[4] The right to vote is inexorably intertwined with the State's right to regulate the election process. To determine whether the prohibition on write-in voting burdens the fundamental right of participating equally in the election of those who govern, we must look at the Hawaii election laws as a whole.

Hawaii election laws provide candidates with considerable ease of access to the ballot. If Burdick desires to vote for a particular candidate, that candidate need only be qualified for the office being sought¹ and demonstrate a minimal amount of support to be placed on the ballot.²

[5] If Burdick desired to vote for a fictional character as a means of making a political statement, he could not get that character's name on the ballot. This restriction may impinge Burdick's political speech, but "ample alternative channels" exists for Burdick to advance his political views. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980). Similarly, the prohibition on write-in voting may limit Burdick's political speech, but it does not restrict the alternative channels available to Burdick for expressing his political

¹ Haw. Rev. Stat. § 12-3 (1988).

² Under Hawaii election laws a candidate for county office or the legislature may gain access to the primary ballot by simply submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education may gain access with twenty-five signatures. Haw. Rev. Stat. § 12-5 (1990 Supp.). Hawaii's election laws also provide for easy access to the ballot by a party. Haw. Rev. Stat. § 11-62 (1988)(signatures of 1% of total registered state voters as of last election).

views.

[6] The prohibition on write-in voting is not based on the content or subject matter of a write-in vote but rather is applicable to all write-in votes and, thus, is a content-neutral, time, place, or manner restriction. See *id.* at 536. "A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable." *Id.*

Hawaii puts few restrictions on a candidate's access to the ballot, and the prohibition on write-in voting places only minimal restrictions on political speech. Accordingly, the fact that Burdick cannot cast a write-in vote does not place any substantial burden on his fundamental right to participate equally in the election of those who will make or administer the laws.³

[7] The fact that a voter may want to say that no candidate is acceptable does not mean that he has a fundamental right to say that on the ballot. Although the voter has a protected right to voice his opinion and attempt to influence others, he has no guarantee that he can voice any particular opinion through the ballot-box. Accordingly, Burdick's asserted right to vote for *any* candidate he chooses does not implicate fundamental constitutional protections.

³ The Supreme Court has not faced the question whether a person's interest in casting a write-in vote is a fundamental right. Rather, the Court has provided conflicting messages concerning the role write-in voting plays in the election process. Compare *Storer*, 415 U.S. at 736 n.7 (resort to write-in alternative provided by California law was adequate substitute for independent candidate who did not qualify for general election ballot) with *Anderson*, 460 U.S. at 799 n.26 (write-in vote is not an adequate substitute for having a candidate's name appear on the ballot in presidential election) and *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) ("The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.").

The second step in the *Anderson* analysis is the identification and evaluation of the "precise interests put forth by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. The State advances three interests in support of its election laws: political stability, voter education, and protecting the internal structure of the State's election laws.

A. Political Stability

[8] Hawaii asserts that it has a legitimate interest in protecting against "sore loser" candidacies and party raiding.⁴ The Supreme Court has acknowledged that States have a compelling interest in ensuring that unrestrained factionalism does not damage the election process. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986). The prohibition on write-in voting serves that interest by ensuring that sore losers do not sidestep the ballot access requirements and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting.

B. Informed Electorate

[9] Hawaii also asserts that it has an interest in protecting the election process from late blooming candidates. The Supreme Court has acknowledged that the State's interest in fostering an informed and educated electorate is a legitimate interest. See *Anderson*, 460 U.S. at 796. The prohibition on write-in voting serves that interest by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidates' positions

⁴ Limitations on sore loser candidacies deny a candidate a spot on the general election ballot if the candidate loses in the primary. *Anderson*, 460 U.S. at 784 n.2; *Storer*, 415 U.S. at 735. Party raiding occurs where "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

and qualifications.

C. Internal Structure of Election Laws

[10] The final interest advanced by Hawaii is its interest in protecting the primary mandate. A State's interest in protecting the integrity of its election process is a compelling interest. *Eu v. San Francisco City Democratic Central Comm.*, 489 U.S. 214, 226 (1989). Hawaii election law provides for the automatic seating of a candidate who is unopposed in a primary. Haw. Rev. Stat. §12-41 (1988). The prohibition on write-in voting ensures that a candidate "seated" after the primary is not challenged in the general election by a write-in candidate.

Under the *Anderson* analysis, therefore, Hawaii's ban on write-in voting does not impermissibly infringe Burdick's constitutional rights of expression and association. *Anderson* does not require a showing of compelling state interest or narrowly tailored laws. It requires that the State's interests justify the burden placed on the plaintiff's constitutional rights.

Hawaii's election laws eliminate frivolous candidacies while still providing access to candidates who have a relatively minor modicum of support. Although the prohibition on write-in voting places some restrictions on Burdick's rights of expression and association, that burden is justified in light of the ease of access to Hawaii's ballots, the alternatives available to Burdick for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State.

IV

We are not unmindful of the fact that the Fourth Circuit has reached a different conclusion in *Dixon v. Maryland State Administrative Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989). In *Dixon*, the Fourth Circuit

held that the casting and counting of write-in votes implicates fundamental rights. *Id.* at 782. The state election law at issue in *Dixon* required candidates for certain city offices to pay a \$150 filing fee in order to qualify as an "official" write-in candidate. Only official write-in candidates could attain office and have the votes cast for them publicly reported. In determining that the casting and counting of write-in votes implicated fundamental rights, the *Dixon* court stated that:

It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable. The Supreme Court has repeatedly recognized that minor parties and their supporters seek "influence, if not always electoral success."

Id. (citations omitted).

The *Dixon* court further reasoned that in many cases write-in voters cast their ballots "in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence." *Id.* The *Dixon* court concluded that the expression of this hope is a constitutionally protected right. *Id.*

[11] We decline to follow the Fourth Circuit's lead. *Dixon* fails to differentiate between a person's right to participate equally in the election of those who govern and a person's right to try to influence the election process. Although a person's hope that he will be able to propagate his views and increase his ability to influence the outcome of an election may be a constitutionally protected right, a prohibition on write-in voting does not substantially burden that hope. Hawaii's election laws

do not affect the myriad of other avenues that are available for propagating one's views and increasing one's influence.

V

The final issue raised by the State is whether the district court failed to give full faith and credit to the Hawaii Supreme Court's ruling in *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989). In *Burdick*, the Hawaii Supreme Court held that Hawaii election laws does not provide for or allow the casting of write-in votes. 776 P.2d at 825-826.

The State asserts that because Hawaii's constitution "tracks almost exactly" the federal constitution, and because *Burdick* did not limit his arguments before the Hawaii Supreme Court to the textually distinct provisions of Hawaii law, *Burdick* elected to seek a comprehensive and final adjudication of his rights in the state court. According to the State, *Burdick* was required to reserve his federal arguments explicitly when the district court certified the three questions on Hawaii state law to the Hawaii Supreme Court. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 417-422 (1964). We disagree.

[12] The parties stipulated that the questions should be certified to the Hawaii Supreme Court, and the district court ordered that the certification take place. The district court specifically explained to the Hawaii Supreme Court that jurisdiction over the federal questions presented by *Burdick*'s suit remained at the district court:

Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determinations. Thus, the Hawaii Su-

preme Court's decision will be determinative of this action.

Burdick did not waive his rights to bring his federal claims before the federal district court, and the district court did not fail to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions.

VI

We conclude that Hawaii's prohibition on write-in voting serves legitimate state interests and is a part of a comprehensive election scheme that provides *Burdick* with adequate opportunities and alternatives to exercise his rights of expression and association. The prohibition on write-in voting, therefore, does not create an impermissible burden on *Burdick*'s first and fourteenth amendment rights when compared with the asserted interests of the State.

REVERSED.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ALAN B. BURDICK,
Plaintiff-Appellee,

v.

MORRIS TAKUSHI, Director of Elections,
State of Hawaii; JOHN WAIHEE, Lieuten-
ant Governor of Hawaii; BENJAMIN CAYETANO,
in his Capacity as Lieutenant Governor
of the State of Hawaii,
Defendants-Appellants.

ALAN B. BURDICK,
Plaintiff-Appellee,

v.

BENJAMIN CAYETANO, in his Capacity as
Lieutenant Governor of the State of Hawaii;
MORRIS TAKUSHI, Director of Elections of
the State of Hawaii,
Defendants-Appellants.

Nos. 90-15873, 90-15876 and 15877.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Argued and Submitted Nov. 5, 1990.

Decided March 1, 1991.

Steven S. Michaels, Deputy Atty. Gen., Honolulu,
Hawaii, for defendants-appellants.

Mary Blaine Johnston, Wailuku, Hawaii, for
plaintiff-appellee.

James M. Johnson, Sr., Asst. Atty. Gen., Olympia,
Wash., for amicus curiae.

Appeal from the United States District Court for the
District of Hawaii.

Before SKOPIL, BEEZER and FERNANDEZ, Cir-
cuit Judges.

BEEZER, Circuit Judge:

The district court ruled that Hawaii's lack of provi-
sion for the casting and counting of write-in votes in
statewide general elections impermissibly infringed a Ha-
waii voter's rights of expression and association as pro-
tected by the first and fourteenth amendments. The dis-
trict court issued a preliminary injunction ordering Ha-
waii to provide for the casting and counting of write-in
votes and then stayed the injunction pending appeal.
We reverse.

I

The facts in this case are undisputed. In June 1986,
Alan Burdick notified the Director of Elections and the
Lieutenant Governor (hereinafter collectively referred to
as the "State"), that he wanted to cast write-in votes in
the upcoming primary elections and in future elections.
The State advised Burdick that its election laws did not
provide for write-in voting and that any write-in votes
would be ignored.

Burdick filed suit in federal court, claiming that the
lack of provision for write-in voting violated both the
Hawaii Constitution and the United States Constitution.
The district court held that the failure to provide for
write-in voting constituted a violation of Burdick's rights
of freedom of expression and association. The court is-
sued a preliminary injunction directing the State to pro-
vide for the casting and counting of write-in votes in
November 1986 statewide elections. The State moved
for a stay of the preliminary injunction pending appeal,
and the motion was denied.

The State appealed the district court's order and denial of stay, and we granted a stay pending appeal. On May 17, 1988, we reversed and directed the district court to abstain from reaching the federal constitutional issue under the *Pullman* abstention doctrine. See, *Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988)("[A] definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitutional question . . .").

On remand, the district court certified the following three questions to the Hawaii Supreme Court:

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

On July 21, 1989, the Hawaii Supreme Court answered no to each question. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824, 825 (1989). With a definitive ruling from the Hawaii Supreme Court that Hawaii's election laws prohibited write-in voting, Burdick renewed his motion for summary judgment in the district court. On May 10, 1990, the district court again ruled that Hawaii's prohibition on write-in voting impermissibly infringed Burdick's federally guaranteed rights of expression and association. The district court again issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes. See *Burdick v. Takushi*,

737 F.Supp. 582 (D. Haw. 1990).

Because a statewide general election was less than four months away, and because this court had granted a stay of the prior preliminary injunction, the district court granted the State's motion to stay the current preliminary injunction pending appeal. *Id.* at 592-593. The State timely appealed the district court's final order.

II

We have jurisdiction pursuant to 28 U.S.C. §1291. A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990).

[1] The State asserts that Burdick does not have standing to challenge Hawaii's general election laws. To support its assertion, the State points to the fact that Burdick cannot vote in some of the races affected by the preliminary injunction and the fact that he has failed to identify a particular candidate for whom he wants to cast his write-in vote. To have standing a party must show that:

"he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)(citations omitted).

Burdick has demonstrated that his rights as a voter to freedom of expression and association are threatened by Hawaii's prohibition on write-in voting. Although an order striking down the prohibition on write-in voting may apply to races in which Burdick cannot vote, the

State does not contend that there is any difference in the way that the prohibition applies to the various elections throughout the state. The prohibition is a general state-wide restriction that affects Burdick personally, and therefore he has standing to challenge it. See *Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989)(Hawaii voter has standing to challenge the whole of the State election laws creating ballot access restrictions).

III

The Supreme Court has acknowledged that "the Framers of the Constitution intended the State to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," and that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973)(citations and internal quotation omitted). Furthermore, the Constitution specifically authorizes states to regulate: "The Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1. The Supreme Court has also recognized that "as a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974).

A state's broad powers to prescribe the time, place and manner of elections, however, "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986). The rights to cast one's vote effectively and to associate for the advancement of political beliefs are guaranteed by the first and fourteenth amendments, and the state may not burden these rights excessively. See *Williams v.*

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).

The questions presented by a challenge to a specific provision in a state's election laws cannot be resolved by applying a "litmus paper test." *Storer*, 451 U.S. at 730, 94 S.Ct. at 1279. There is no self-executing rule that is a substitute for the "hard judgments that must be made." *Id.* In *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983), the Supreme Court set forth an analytical process for making these hard judgments. A court must:

first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id.

We begin the *Anderson* analysis by determining the "character and magnitude" of the injury to Burdick's rights of expression and association. Burdick asserts that the prohibition on write-in voting impinges his right to vote for the candidate of his choice. He asserts that the right to vote for the candidate of one's choice is a fundamental right.

Article I, §2 of the United States Constitution grants persons qualified to vote "a constitutional right to vote

and to have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). The Supreme Court has stated that:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Id.

[2] The fundamental nature of the right to vote is based on a citizen's right to have a voice in the selection of those who govern. Casting one's vote does not implicate fundamental rights in a vacuum. Fundamental rights are implicated as a part of the process through which citizens elect the people who make and administer the laws. Burdick does not have a fundamental right to vote for any particular candidate; he is simply guaranteed an equal voice in the election of those who govern.

For example, Art. I, §2 of the United States Constitution limits congressional candidates to persons twenty-five and older with seven years citizenship, and Art. II, §1 of the United States Constitution limits presidential candidates to natural born citizens thirty-five and older. Moreover, Art. II, §1 of the United States Constitution provides that a vote for the office of the President is for an Elector rather than for an individual presidential candidate. The Supreme Court has upheld numerous state restrictions on who may qualify to run for certain offices. See, e.g., *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)(incumbent Justice of the Peace denied right to seek election to state legislature, and state and county office holders deemed automatically resigned if they run for another elective office); *Storer*, 415 U.S. 724, 94 S.Ct. 1274 (state can require candidate to sever affiliation with political party one year prior to

election in order to run as independent candidate); *American Party of Texas v. White*, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974)(state can deny place on ballot to frivolous candidate by requiring candidates to "demonstrate a significant, measurable quantum of community support").

[3] The right to vote is inexorably intertwined with the State's right to regulate the election process. To determine whether the prohibition on write-in voting burdens the fundamental right of participating equally in the election of those who govern, we must look at the Hawaii election laws as a whole.

Hawaii election laws provide candidates with considerable ease of access to the ballot. If Burdick desires to vote for a particular candidate, that candidate need only be qualified for the office being sought¹ and demonstrate a minimal amount of support to be placed on the ballot.²

If Burdick desired to vote for a fictional character as a means of making a political statement, he could not get that character's name on the ballot. This restriction may impinge Burdick's political speech, but "ample alternative channels" exist for Burdick to advance his political views. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

[4] The prohibition on write-in voting is not based

¹ Haw. Rev. Stat. §12-3 (1988).

² Under Hawaii election laws a candidate for county office or the legislature may gain access to the primary ballot by simply submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education may gain access with twenty-five signatures. Haw. Rev. Stat. §12-5 (1990 Supp.). Hawaii's election laws also provide for easy access to the ballot by a party. Haw. Rev. Stat. §11-62 (1988)(signatures of 1% of total registered state voters as of last election).

on the content or subject matter of a write-in vote but rather is applicable to all write-in votes and, thus, is a content-neutral, time, place, or manner restriction. See *id.* at 536, 100 S.Ct. 2332. "A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable." *Id.*

[5] Hawaii puts few restrictions on a candidate's access to the ballot, and the prohibition on write-in voting places only minimal restrictions on political speech. Accordingly, the fact that Burdick cannot cast a write-in vote does not place any substantial burden on his fundamental right to participate equally in the election of those who will make or administer the laws.³

[6] The fact that a voter may want to say that no candidate is acceptable does not mean that he has a fundamental right to say that on the ballot. Although the voter has a protected right to voice his opinion and attempt to influence others, he has no guarantee that he can voice any particular opinion through the ballot-box. Accordingly, Burdick's asserted right to vote for *any* candidate he chooses does not implicate fundamental constitutional protections.

[7] The second step in the *Anderson* analysis is the

³ The Supreme Court has not faced the question whether a person's interest in casting a write-in vote is a fundamental right. Rather, the Court has provided conflicting messages concerning the role write-in voting plays in the election process. Compare *Storer*, 415 U.S. at 736 n.7, 94 S.Ct. at 1282 n.7 (resort to write-in alternative provided by California law was adequate substitute for independent candidate who did not qualify for general election ballot) with *Anderson*, 460 U.S. at 799 n.26, 103 S.Ct. at 1575 n.6 (write-in vote is not an adequate substitute for having a candidate's name appear on the ballot in presidential election) and *Lubin v. Panish*, 415 U.S. 709, 719 n. 5, 94 S.Ct. 1315, 1321, 39 L.Ed.2d 702 (1974) ("The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot").

identification and evaluation of the "precise interests put forth by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789, 103 S.Ct. at 1570. The State advances three interests in support of its election laws: political stability, voter education, and protecting the internal structure of the State's election laws.

A. Political Stability

Hawaii asserts that it has a legitimate interest in protecting against "sore loser" candidacies and party raiding.⁴ The Supreme Court has acknowledged that States have a compelling interest in ensuring that unrestrained factionalism does not damage the election process. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 196, 107 S.Ct. 533, 538, 93 L.Ed.2d 499 (1986). The prohibition on write-in voting serves that interest by ensuring that sore losers do not sidestep the ballot access requirements and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting.

B. Informed Electorate

Hawaii also asserts that it has an interest in protecting the election process from late blooming candidates. The Supreme Court has acknowledged that the State's interest in fostering an informed and educated electorate is a legitimate interest. See *Anderson*, 460 U.S. at 796, 103 S.Ct. at 1574. The prohibition on write-in voting serves that interest by ensuring that candidates place themselves on the ballot in time to allow the electorate

⁴ Limitations on sore loser candidacies deny a candidate a spot on the general election ballot if the candidate loses in the primary. *Anderson*, 460 U.S. at 784, 103 S.Ct. at 1567; *Storer*, 415 U.S. at 735, 94 S.Ct. at 1281. Party raiding occurs where "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760, 93 S.Ct. 1245, 1251, 36 L.Ed.2d 1 (1973).

an ample opportunity to examine the candidate's positions and qualifications.

C. *Internal Structure of Election Laws*

The final interest advanced by Hawaii is its interest in protecting the primary mandate. A State's interest in protecting the integrity of its election process is a compelling interest. *Eu v. San Francisco City Democratic Central Comm.*, 489 U.S. 214, 226, 109 S.Ct. 1013, 1018, 103 L.Ed.2d 271 (1989). Hawaii election law provides for the automatic seating of a candidate who is unopposed in a primary. Haw. Rev. Stat. §12-41 (1988). The prohibition on write-in voting ensures that a candidate "seated" after the primary is not challenged in the general election by a write-in candidate.

Under the *Anderson* analysis, therefore, Hawaii's ban on write-in voting does not impermissibly infringe Burdick's constitutional rights of expression and association. *Anderson* does not require a showing of compelling state interests or narrowly tailored laws. It requires that the State's interests justify the burden placed on the plaintiff's constitutional rights.

Hawaii's prohibition on write-in voting eliminates frivolous candidacies while still providing access to candidates who have a relatively minor modicum of support. Although the prohibition on write-in voting places some restrictions on Burdick's rights of expression and association, that burden is justified in light of the case of access to Hawaii's ballots, the alternatives available to Burdick for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State.

IV

We are not unmindful of the fact that the Fourth Circuit has reached a different conclusion in *Dixon v. Maryland State Administrative Bd. of Election Laws*, 878

F.2d 776 (4th Cir. 1989). In *Dixon*, the Fourth Circuit held that the casting and counting of write-in votes implicates fundamental rights. *Id.* at 782. The state election law at issue in *Dixon* required candidates for certain city offices to pay at \$150 filing fee in order to qualify as an "official" write-in candidate. Only official write-in candidates could attain office and have the votes cast for them publicly reported. In determining that the casting and counting of write-in votes implicated fundamental rights, the *Dixon* court stated that:

It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable. The Supreme Court has repeatedly recognized that minor parties and their supporters seek "influence, if not always electoral success."

Id. (citations omitted).

The *Dixon* court further reasoned that in many cases write-in voters cast their ballots "in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence." *Id.* The *Dixon* court concluded that the expression of this hope is a constitutionally protected right. *Id.*

We decline to follow the Fourth Circuit's lead. *Dixon* fails to differentiate between a person's right to participate equally in the election of those who govern and a person's right to try to influence the election process. Although a person's hope that he will be able to propagate his views and increase his ability to influence the outcome of an election may be a constitutionally

protected right, a prohibition on write-in voting does not substantially burden that hope. Hawaii's election laws do not affect the myriad of other avenues that are available for propagating one's views and increasing one's influence.

V

[8] The final issue raised by the State is whether the district court failed to give full faith and credit to the Hawaii Supreme Court's ruling in *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989). In *Burdick*, the Hawaii Supreme Court held that Hawaii election law does not provide for or allow the casting of write-in votes. 776 P.2d at 825-826.

The State asserts that because Hawaii's constitution "tracks almost exactly" the federal constitution, and because Burdick did not limit his arguments before the Hawaii Supreme Court to the textually distinct provisions of Hawaii law, Burdick elected to seek a comprehensive and final adjudication of his rights in the state court. According to the State, Burdick was required to reserve his federal arguments explicitly when the district court certified the three questions on Hawaii state law to the Hawaii Supreme Court. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 417-422, 84 S.Ct. 461, 465-68, 11 L.Ed.2d 440 (1964). We disagree.

The parties stipulated that the questions should be certified to the Hawaii Supreme Court, and the district court ordered that the certification take place. The district court specifically explained to the Hawaii Supreme Court that jurisdiction over the federal questions presented by Burdick's suit remained at the district court:

Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previ-

ous determination. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

Burdick did not waive his rights to bring his federal claims before the federal district court, and the district court did not fail to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions.

VI

We conclude that Hawaii's prohibition on write-in voting serves legitimate state interests and is a part of a comprehensive election scheme that provides Burdick with adequate opportunities and alternatives to exercise his rights of expression and association. The prohibition on write-in voting, therefore, does not create an impermissible burden on Burdick's first and fourteenth amendment rights when compared with the asserted interests of the State.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

-----X
ALAN B. BURDICK,) Civil No. 86-
) 0582 HMF
Plaintiff,)
v.)
MORRIS TAKUSHI, Director)
of Elections, State of Hawaii;)
JOHN WAIHEE, Lieutenant)
Governor, State of Hawaii,)
Defendants.)
-----X

ALAN B. BURDICK,) Civil No. 88-
) 0365 HMF
Plaintiff,)
v.)
BENJAMIN CAYETANO, in his)
individual capacity as Lieutenant)
Governor of the State of Hawaii;)
MORRIS TAKUSKI, Director of)
Elections of the State of Hawaii,)
Defendants.)
-----X

**ORDER GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND PERMANENT INJUNC-
TIVE RELIEF; DENYING DEFENDANTS' COUNTER-
MOTION FOR SUMMARY JUDGMENT; AND
GRANTING DEFENDANTS' CONDITIONAL
COUNTER-MOTION FOR STAY**

INTRODUCTION

On May 7, 1990, the court heard oral argument on plaintiff's motion for summary judgment and permanent injunctive relief and defendants' counter-motion for summary judgment and conditional counter-motion for stay.

BACKGROUND

In June 1986, plaintiff Alan B. Burdick notified defendants, the Director of Elections ~~and~~ the Lieutenant Governor (who serves as the Chief Elections Officer), that he wished to cast one or more write-in votes in the September 1986 primary elections and in future elections. After consulting with the Attorney General's office, defendants advised plaintiff that Hawaii election laws did not provide for write-in voting and that such votes would be disallowed or ignored.

Burdick filed suit in federal district court, claiming that Hawaii's ban on write-in voting violated both the Hawaii Constitution and the United States Constitution. This court agreed, granting plaintiff's motion for summary judgment on the ground that the refusal to permit write-in voting violated plaintiff's constitutionally guaranteed freedoms of expression and association. This court then issued an injunction ordering defendants to provide for the casting and counting of write-in votes in the 1986 general election. Defendants moved for a stay of this court's 1986 injunction which this court denied on October 8, 1986.

Defendants appealed this court's September 29, 1986 order to the Ninth Circuit Court of Appeals, and obtained a stay of the order pending appeal. On May 17, 1988,¹ the appellate court issued a decision vacating this

¹ Coincidentally, knowing the length of time it might take the Ninth Circuit to adjudicate defendants' appeal and unaware that the Ninth Circuit opinion's would be issued the same day, plaintiff Burdick filed
(continued...)

court's order on the ground that this court should have abstained from ruling on the federal constitutional issue. The appellate court found that *Pullman* abstention was proper in this case since the question whether Hawaii's statutes or constitution required or permitted write-in voting was an undecided question of state law, and a definitive resolution of this question might have obviated the need to decide the federal constitutional question. *Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988), citing *Railroad Commission v. Pullman*, 312 U.S. 496 (1941).

Following the Ninth Circuit's decision, the following questions were certified to the Hawaii Supreme Court:

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

On July 21, 1989, the Hawaii Supreme Court entered a ruling, answering "No" to each of the three questions presented. The court found that Hawaii's statutory election scheme precluded write-in balloting and found this ban on write-in voting permissible under the Hawaii state constitution. *Burdick v. Takushi*, 70 Haw. 498 (1989).

Now that the Hawaii Supreme Court has found that

¹ (...continued)

a new action (*Burdick v. Cayetano*, Civil No. 88-0365) on May 17, 1988. The two action were later consolidated.

Hawaii's statutory election scheme prohibits write-in voting, the federal constitutional issue which this court decided three-and-a-half years ago is again before this court. Specifically, this court must decide whether Hawaii's ban on write-in voting violates the First and Fourteenth Amendments as to the United States Constitution.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. *But cf., id.*, 477 U.S. at 328, 106 S.Ct. at 2555-56 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir.

1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. See *T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence that would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the non-moving party with respect to the fact." *T.W. Elec.*, 809 F.2d at 631. Also, inference from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*

DISCUSSION

The facts of this case are simple and undisputed. Since both parties are asking this court to grant summary

judgment in their favor, they agree that no material issue of fact is in dispute and that the court need only concern itself with the disputed issue law: constitutionality of Hawaii's ban on write-in voting.

Plaintiff argues that Hawaii's ban on write-in voting violates his and all other voters' free speech rights guaranteed by the U.S. Constitution. Defendants argue that the burden on plaintiff's constitutional rights is impermissible because compelling state interests are served by the ban on write-in voting.

Initially, the court must determine the appropriate standard of review by which it will adjudge the validity of the challenged prohibition. "Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebreeze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983). Such challenges usually are governed by a balancing test. Under this balancing test,

. . . a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789 (citations omitted). See also *Erum v. Caye-*

tano, 881 F.2d 689 (9th Cir. 1989); *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988).

Recently, the United States Supreme Court applied a strict scrutiny standard of review in assessing the constitutionality of state election law. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989). The Court held:

To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, *it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest.*

Id. at 1019-20. See also *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988)(apply strict scrutiny standard of review).

This court applied the *Anderson* balancing test when it evaluated plaintiff's constitutional challenge three-and-a-half years ago. Since *Anderson* still appears to be the applicable standard in the Ninth Circuit, this court again will utilize the *Anderson* balancing analysis today. *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). However, the court will also bear in mind the fact that recent Supreme Court authority suggests a stricter standard of review may be appropriate. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989).

I. Character and Magnitude of Injury to Plaintiff's First and Fourteenth Amendment Rights

The right to vote for the candidate of one's choice is a fundamental right. "No right is more precious in a

free country than that of having a voice in the election of those who make the laws under which, as good citizens, we live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

Indeed, "[t]he right to vote freely for the candidate of one's choice is [] the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983, 987 (S.D. Ohio 1968). "Rights relating to the franchise implicate the First Amendment 'with its guarantee that an individual be allowed to participate in the most general communicative processes that determine the contours of our social and political thought.'" *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 473-74 (1985), citing Tribe, *American Constitutional Law* at 737.

The electoral process is the process by which voters select candidates to fill representative political offices. The State may not unduly burden the freedom of choice which a voter exercises in the voting booth. If a citizen has the right to vote, a right which is guaranteed by the U.S. Constitution, then he should be allowed to vote for any candidate of his choice, subject to reasonable conditions and qualifications imposed by the State. See *Socialist Party v. Rhodes*, 290 F.Supp. 983 (S.D. Ohio 1968).

Hawaii's absolute ban on write-in voting also affects the rights of association and political expression of both voters and potential candidates. *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 473 (1985). It is a well-established tenet that "speech concerning public affairs is more than self-expression; it is the essence of self government." *Id.* at 479. Being able to vote for the candidate of one's choice, even when that candidate is not one of the listed candidates on the ballot, is the type of significant political expression which the First Amendment was designed to protect. Similarly, the First Amendment protects the

right to freely participate in the electoral process. Political participation should not be limited to those who adhere to the ideals and goals of the major political parties, but should include all citizens who wish to publicly demonstrate support for a certain candidate or political theory. *Socialist Party v. Rhodes*, *supra* at 987.

A ban on write-in voting directly burdens the voter's right to freely vote for the candidate of his choice by completely precluding that voter's choice. This burden is of a significant magnitude given the importance of the right impaired.

There has been some suggestion that the right to be a candidate for political office, in and of itself, may not be a fundamental right. *Dixon v. Maryland State Administrative Election Laws*, 878 F.2d 776, 779 (4th Cir. 1989). This court recognizes that "not all restrictions imposed by the States on candidates' eligibility . . . impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson v. Celebrezze*, 460 U.S. at 78. However, this court is not being asked to decide the constitutionality of an election statute restricting a candidate's access to the ballot or the candidate's right to have the State print his name on the ballot. This court must decide the constitutionality of Hawaii's prohibition on a voter's right to vote for the candidate of his choosing, even if that candidate is not one of the candidates on the printed ballot.

This court realizes that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 474 (1985). Nevertheless, the court is not as greatly concerned with the candidate's right to run for political office as it is with the voter's right to vote for the candidate of his choice, associate with the candidate of his choosing, and exercise freedom of political expression. Therefore, even though

the right to be a candidate for political office in and of itself may not be a fundamental constitutional right, this right, in conjunction with the deprivation of freedom of expression and the right to vote, two established fundamental rights, amounts to an enormous injury to plaintiff's First and Fourteenth Amendment rights. Accordingly, this court finds that the character and magnitude of the alleged burden on plaintiff's constitutional rights is significantly great.

II. The Interests Which the State Has Presented as Justifications for the Burden on Plaintiff's Constitutional Rights

The State has presented three main interests which it asserts are sufficiently compelling to justify the enormous burden on plaintiff's constitutional rights. These are: (1) the interest in avoiding factionalism or confining intra-party feuds, (2) the interest in fostering an informed electorate, and (3) the interest in protecting the primary mandate.

The first interest which the State advances is the State's interest in confining intra-party feuds. The State argues that the ban on write-in voting is necessary to limit the problems that arise when a defeated party candidate carries an intra-party feud into the general election campaign. The State fears that a "sore loser" who failed at the nomination or primary stage would be able to wage a new campaign if write-in voting were allowed. Prohibiting write-in voting at the general election stage, according to the State, ensures that the primary election "is not merely an exercise or warm-up for the general election but an integral part of the election process." *Storer v. Brown*, 415 U.S. 724, 735 (1974). Such a ban allegedly enables the State of reserve the general election for major struggles. *Id.* at 734.

In *Storer v. Brown*, *supra*, the United States Supreme Court decided the constitutionality of a California statute

forbidding an independent candidate from a place on the ballot if he was affiliated with a political party within one year prior to the preceding primary election. In that context, the Court defended the California electoral process and its disaffiliation requirement. The Court, however, did not address the issue of the constitutionality of a ban on write-in voting.

The interest in avoiding unrestrained factionalism has been recognized as a compelling interest in at least two ballot-access cases. *Storer v. Brown*, 415 U.S. 724 (1974); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). An interest can be a compelling interest in certain circumstances, yet fail to rise to that level of compellingness in other sets of circumstances. See *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989)(recognizing that the state's interests in a stable government and protecting voters from confusion were compelling or at least legitimate interests, but finding these interests insufficient to justify California's ban on primary endorsements by political parties); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981)(holding that Wisconsin's asserted compelling interests in preserving the integrity of the election process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters did not justify the State's substantial intrusion into the associational freedom of members of a minor party). This is particularly true in the present case.

The State cites several cases to demonstrate that the interests it asserts as justifications for the ban on write-in voting are compelling and necessary, but none of the cases it relies upon ever squarely addressed the issue of write-in voting that this court faces. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)(deciding constitutionality of Washington statute requiring a minor-party candidate to receive at least 1% of all votes cast for an office in a primary election before his name could

be placed on the general election ballot); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989)(deciding constitutionality of Hawaii statute requiring non-partisan candidates, in order to have their names printed on the general election ballot, to receive 10% of the votes cast in the primary election or at least as many votes as the least favored, successful partisan candidate); *McLain v. Meir*, 851 F.2d 1045 (8th Cir. 1988)²(deciding constitutionality of North Dakota statute requiring third party candidates to collect 7,000 signatures 55 days before the primary election and independent candidates to collect 1,000 signatures 55 days before the general election in order to be placed on the ballot); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988)(deciding constitutionality of Oklahoma statute requiring the filing of a petition with 5% of the total votes cast in the last gubernatorial or presidential election to create a new party); *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985)(deciding constitutionality of Indiana statute requiring minor parties wishing to be listed on the ballot to submit petitions with 2% of the number of persons who voted in the preceding election).

In *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989), the United States Supreme Court examined a provision of the California Election Code which banned primary endorsements by political parties and imposed restrictions on the internal governance of political parties. One of the State's arguments in support of its electoral scheme was that a party

² The *McLain* court did not address the question whether a ban on write-in voting violated the plaintiff's rights on the ground that the federal district court lacked federal jurisdiction to hear this claim. The *McLain* court's reasoning is difficult to understand. When a voter challenges a ban on write-in voting as violative of his First and Fourteenth Amendment rights under the U.S. Constitution, it appears that the claim "arises under" a federal question by virtue of the fact that the plaintiff is alleging the violation of the U.S. Constitution.

that issues primary endorsements risks intra-party friction which might endanger the party's general election prospects. *Id.* at 1022. The Court, however, held:

[E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party. *Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.*

Id. at 1022-23 (citations omitted). See also *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (holding that the State's asserted interest in political stability amounts to a desire to protect existing political parties from competition generated by independent candidates who have previously been affiliated with a party, an interest that conflicts with First Amendment values).

In this case, the State's asserted interest in avoiding intra-party factionalism is not compelling under the present circumstances because it amounts to a desire to quash any possible competition generated by a candidate who does not have a place on the printed ballot, but who may garner support as a write-in candidate. This strikes at the very heart of our democratic processes and our country's long history of self-governance. The State should not paternalistically substitute its judgment as to what the voters want for the voters' own judgment. If even one voter wishes to dissent from the voice of the majority by writing in the name of a candidate not available on the printed ballot, this court believes that is his right to do so.

The second interest advanced by the State is the interest in fostering an informed electorate. This interest includes not only the interest in having an electorate which is fully informed about who is seeking office and

what that candidate stands for, *Gebelein v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979)³, but also the interest in protecting the integrity of the political process from frivolous or fraudulent candidacies. *McLain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988).

The State certainly has a legitimate interest in fostering an informed electorate. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1023 (1989). However, this interest may not always be considered sufficiently weighty to justify a burden on constitutional rights. *Id.* at 1023. "Moreover, as a matter of practical politics, the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown candidates simply do not win large numbers of votes. A key goal of every political campaign is to promote the candidate's name identification among the electorate." *Anderson v. Celebrezze*, 460 U.S. 780, 189-90 n.25 (1983).

Similarly, although the State's interest in protecting the electoral process from frivolous or fraudulent candidacies may be legitimate and even compelling in certain

³ The Court of Chancery of Delaware in *Gebelein* never resolved the issue of whether the Town's refusal to permit write-in ballots at the annual municipal election was unconstitutional. The court merely recognized the interests of both the voters and the municipality, stating:

The officials of Frederica and similar small municipalities therefore have the difficult task of attempting to balance two competing interests. The first is the right of voters to express their displeasure at those who are serving as town officials. One way to express this disapproval is for them to write in names on a ballot . . . The second interest is the right of the electorate to be fully informed as to whom is seeking office and what they stand for. There is no easy answer to this dilemma and since the issue is not now properly before me, a definitive answer must await another day.

circumstances, it is not always recognized as such. The Court of Appeals for the Fourth Circuit encountered this predicament in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989). In that case, the court was asked to decide the constitutionality of Maryland's requirement that write-in candidates for public office pay a filing fee of \$150. The court found this statute unconstitutionally interfered with voters' right to elect candidates of their choice. One of the state's asserted interests was denying official recognition to fraudulent and frivolous candidates to minimize voter confusion and preserve the integrity of the political process. The court recognized this interest as indisputably a legitimate and weighty one in some circumstances. The court explained:

In cases involving candidates seeking positions on ballots, for example, the Supreme Court has acknowledged that weeding out spurious candidates for these reasons is a valid objective. In our view, *this concern does not weigh as heavily where according official status to write-in candidates in advance of election day is concerned.* In this context, where the voters have time to study the candidates to gauge their seriousness prior to the actual balloting, it would seem that room is available for a broader range of candidates representing a wider spectrum of interests.

Id. at 784 (citations omitted).

In this case, a complete ban on write-in voting does not serve a compelling interest in avoiding fraudulent or frivolous candidacies. Whatever spurious and frivolous candidates the ban on write-in voting weeds out, it also stifles what may be serious, legitimate candidacy. *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 478 (1985). Moreover, it appears that write-in voting is allowed in

most other states.⁴ It is unlikely that so many state legislatures would provide for write-in voting if the dangers of frivolous candidacies and uninformed voters were really a significant problem. *Id.* at 479.

Finally, the state's asserted interest in protecting the primary mandate includes its interest in finality and protecting the integrity of the election process. The State argues that under the current automatic-seating provision, a primary winner who faces no opposition can be seated automatically. If the State were required to count write-in votes, this might result in a candidate who would have been seated automatically under the present electoral scheme, being forced to continue to spend time and money campaigning even though he otherwise would have won.

The State certainly has a legitimate interest in protecting the integrity of its election process. *Eu v. San Francisco County Democratic Central Committee*, 109 S. Ct. 1013, 1024 (1989). Nonetheless, it is against the notion of representative government for the State to deprive voters of the right to vote for the candidate of their choice to protect the primary winner from having to spend time and money campaigning. The essence of our system of self-government is the marketplace of ideas. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' . . . This no more than reflects our 'profound national commitment to the principle that debate on public issues

⁴ Plaintiff claims that 48 states allow some form of write-in voting. The State recognizes that at least twenty states provide for limited write-in voting. See Defendant's Reply Memorandum at 6.

should be uninhibited, robust, and wide-open.” *Federal Election Comm’n v. Natural Conserv. Pol. Action*, 470 U.S. 480, 493, 105 S.Ct. 1459, 1466 (1985), citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

If a write-in candidate can command so much attention that he poses a threat to an otherwise automatically-seated primary winner, then it is worth the extra time and money for the electorate to be exposed to increased debate and public discussion. It is often the unpopular view of minor or non-party candidates which become the views of the mainstream by virtue of being expressed.

A balancing of the rights of the voters against the interests asserted by the State leads this court to the conclusion that Hawaii’s prohibition on write-in voting is unconstitutional. The absolute ban on write-in voting burdens the right to freely vote for the candidate of one’s choice, and implicates the rights of free expression and association. None of the interests the State has asserted is sufficiently weighty to justify this enormous burden on plaintiff’s constitutional rights. Therefore, applying the *Anderson* balancing analysis, this court holds that Hawaii’s ban on write-in voting impermissibly infringes on plaintiff’s First and Fourteenth Amendment rights.

The State raises several peripheral arguments in its counter-motion for summary judgment outside the scope of the applicable balancing analysis. The State argues that this Court’s ruling in 1986 that Hawaii’s ban on write-in voting is contrary to now settled law. As noted above, none of the cases cited by the State addressed the constitutionality of a state ban on write-in voting. See *supra* at 13-14. And, although the courts in those cases may have found the asserted state interests sufficiently compelling to justify restrictions in ballot access, none of those decisions addressed the issue this court faces today - that of the constitutionality of a complete ban on write-

in voting.

The State also argues that by prohibiting write-in voting while offering easy access to the ballot, Hawaii does no more than what other states do by regulating write-in voting. There is a major difference, however, between the states that limit write-in voting and Hawaii. Those states that limit write-in voting *allow* at least some form of write-in voting, while Hawaii completely prohibits any form of write-in voting.

The State argues that a ban on write-in voting is merely a time, place and manner restriction on speech. The State’s argument is misplaced. The court recognizes that the State has broad power to regulate the time, place and manner of its elections. This broad power, however, does not eliminate the State’s responsibility to observe the limits established by the First Amendment. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1019 (1989). Additionally, the ban on write-in voting is not merely a restriction on speech. It constitutes a total ban on the right to vote for the candidate of one’s choice if that candidate is not listed on the ballot.

The State argues that if it must tolerate plaintiff’s speech, which it characterizes as “spoiling” the ballot with a write-in vote, then it should not have to count and publish the vote. “A right to ‘express [one’s] feelings’ without legal effect, however, is antithetical to the fundamental nature of the right to vote.” *Canaan v. Abdellour*, 221 Cal. Rptr. 468, 476-77 (1985). As this court stated in its order of September 29, 1986, “Of course, it goes virtually without saying that the ability to cast a write-in vote includes a right to have that vote considered. To afford a voter the opportunity to write in the name of his candidate, and then to ignore that vote, is to offer a hollow right indeed.” Order Granting Motion for Summary Judgment and for Permanent Injunction at 11. The State should be required to count any

write-in votes cast.

The State argues that plaintiff has waived his right to argue the federal constitutional issue before this court, and that the Hawaii Supreme Court's decision in *Burdick v. Takushi*, 70 Haw. 498 (1989) has res judicata or collateral estoppel effect on this court. Defendants' arguments are completely without merit. The Hawaii Supreme Court did not decide the federal constitutional issue which is before this court today. The Hawaii Supreme Court merely decided that neither the Hawaii Constitution nor its statutory framework requires or permits Hawaii election officials to allow voters to cast write-in votes and to count and publish write-in votes.

Similarly, the Court of Appeals for the Ninth Circuit did not decide the federal constitutional question before this court today. The Ninth Circuit vacated this court's judgment on the ground that this court should have abstained from deciding the merits of plaintiff's constitutional challenge because it was not clear whether Hawaii's election laws prohibited write-in voting. It did not reach the merits of the federal constitutional issue.

Even if defendants raised arguments regarding the federal constitutional issue in their briefs before the Ninth Circuit Court of Appeals and the Hawaii Supreme Court, since these courts did not address the merits of the federal constitutional issue, this court fails to see how such action by *defendants* constitutes a waiver of *plaintiff's* right to argue the federal constitutional issue before this court, especially in light of the fact that this court retained jurisdiction over the federal constitutional question when it certified the questions to the Hawaii Supreme Court.

None of the State's additional arguments are persuasive upon this court. This court holds that Hawaii's absolute ban on write-in voting impermissibly infringes on plaintiff's federal constitutional rights and that no com-

PELLING state interests exist to justify this intrusion. Accordingly, the court GRANTS plaintiff's motion for summary judgment and for permanent injunctive relief.

III. Stay Pending Appeal

The State has asked this court to stay the injunction pending appeal to the Court of Appeals for the Ninth Circuit. In light of the fact that it is unlikely that the Ninth Circuit will adjudicate this matter within the four months between the date of filing of this court's order and the primary election is September, this court recognizes the hardship and injury defendants will suffer if forced to provide for and count write-in ballots on this year's primary and general elections before a final resolution of this issue has been rendered by the appellate court. This court is also aware that a prior appellate panel of the Ninth Circuit reversed this Court's previous order denying defendants' motion for a stay, and it appears likely that the appellate court will follow the course of least resistance and take such action again if this court denies defendants' motion for stay. Without any diminution in the strength of this court's opinion regarding the merits of its position, and the court's belief that plaintiff continues to suffer enormous deprivation of his constitutional rights from Hawaii's absolute ban on write-in voting, this court is constrained to reluctantly GRANT defendants' conditional counter-motion for stay with the admonition that the parties pursue an expeditious appeal of this case.

IT IS SO ORDERED

DATED: Honolulu, Hawaii, May 10, 1990

/s/
HAROLD M. FONG
United States District Judge

SUPREME COURT OF HAWAII

July 21, 1989

No. 13157

-----x
ALAN B. BURDICK,)
)
Plaintiff-Appellant,)
)
v.)
)
MORRIS TAKUSHI, Director)
of Elections, State of Hawaii;)
JOHN WAIHEE, Lieutenant)
Governor, State of Hawaii,)
)
Defendants-Appellees.)
-----x

Mary Blaine Johnston, Wailuku, Maui, for plaintiff-appellant.

Steven S. Michaels, Dept. of the Atty. Gen., (Charlene M. Aina, with him, on the brief), Deputies Atty., Honolulu, for defendants-appellees.

Before LUM, C.J., and NAKAMURA, PADGETT, HAYASHI and WAKATSUKI, JJ.

PADGETT, Justice.

Three questions have been certified to us by the United States District Court for the District of Hawaii. The questions and our answers are as follows.

(1) Does the Constitution of the State Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to

count and publish write-in votes?

Answer. No.

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

Answer. No.

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

Answer. No.

HRS §16-1 provides:

The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.

Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12.

HRS §16-22 provides:

The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting by paper ballot.

These provisions seemingly might permit the chief elections officer to allow write-in votes pursuant to regulations, or on an experimental basis if such voting did not conflict with other statutes, but our review of the present election statutes leads us to the conclusion that such a conflict exists.

With respect to general and special general elections, HRS §12-1 provides:

All candidates for elective office, except as provided in section 14-21, shall be *nominated* in accordance with this chapter

(Underscoring supplied.)

HRS §12-2 provides in part:

No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary.

Write-in votes therefore cannot be cast or counted and published in such general or special general elections.

HRS Chapter 12 governs primary elections. That chapter does not expressly forbid write-in votes at primary elections.

Hawaii's election laws provide for easy access to the ballot by new, or minority parties, and by nonpartisan candidates. However, they do require that the nomination process be followed, and they do attempt to make

the process of casting and counting ballots an orderly one, where the opportunities for fraud are minimized.

HRS §12-22 provides that:

There shall be only one primary or special primary ballot containing the names of all nonpartisan candidates to be voted for and the offices for which they are candidates. The ballot shall be clearly designated as the nonpartisan primary or special primary ballot and shall conform in all other respects to the requirements relative to official party ballots.

This section requires the nonpartisan ballot at the primary to contain the names of all nonpartisan candidates. A write-in candidate would not be on the ballot and thus write-in votes are not possible in this statutory framework.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

ALAN B. BURDICK,)	
)	
Plaintiff,	)	Civil No. 86-0582
)	
vs.)	
)	
MORRIS TAKUSHI, Director)	
of Elections, State of)	
Hawaii, JOHN WAIHEE,)	
Lieutenant Governor,)	
State of Hawaii,)	
)	
Defendants.)	

**ORDER CERTIFYING QUESTIONS OF HAWAII
LAW TO THE SUPREME COURT OF THE STATE
OF HAWAII**

The parties to this case have submitted a stipulation requesting the United States District Court for the District of Hawaii to certify certain questions to the Supreme Court of the State of Hawaii. The court finds good cause to certify these questions and being fully informed of the premises therefor.

IT IS HEREBY ORDERED that the Clerk of the United States District Court for the District of Hawaii shall forthwith cause the filing of the appropriate certificate, a copy of which is attached hereto as Exhibit 1, submitting the following questions to the Supreme Court of the State of Hawaii;

- (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in

votes?

- (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

Dated: Honolulu, Hawaii, July 19, 1988

_____/s/_____
HAROLD M. FONG
United States District Judge

**IN THE SUPREME COURT
OF THE STATE OF HAWAII**

ALAN B. BURDICK,)	
)	
Plaintiff,	)	AMENDED CERTIFICA-
	)	TION FROM THE
vs.	)	UNITED STATES DIS-
	)	TRICT COURT FOR
MORRIS TAKUSHI,	)	THE DISTRICT OF
Director of Elections,	)	HAWAII
State of Hawaii,)	
JOHN WAIHEE,)	
Lieutenant Governor,	)	(USDC NO. 86-0582
State of Hawaii,	)	HMF)
)	
Defendants.)	
)	

AMENDED CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII TO THE SUPREME COURT OF THE STATE OF HAWAII

I. INTRODUCTION

The United States District Court for the District of Hawaii has before it in the case entitled *Burdick v. Takushi, et al.*, Civil No. 86-0582, questions regarding the United States Constitution, the Hawaii Constitution and election laws of the State of Hawaii. The questions regarding the Hawaii Constitution and the Hawaii election laws are determinative of the action and there is no clear precedent controlling these questions in the decisions of the courts of the State of Hawaii. Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court answer the questions as set forth in Part II of this certification by written opinion.

**II. STATEMENT OF PRIOR PROCEEDINGS AND
STATEMENT OF FACTS**

In May 1986 plaintiff Burdick notified defendants Takushi and Waihee that he wished to cast one or more write-in votes in the September 1986 primary election and in future elections. After consulting with the State Attorney General, defendants informed Burdick that Hawaii election laws do not provide for write-ins and that such votes would be disallowed or ignored.

Burdick filed suit in federal district court claiming that in the upcoming primary election and in future primary and general elections he wished to vote for persons whose names may not or would not appear on the printed ballot and that a ban on such write-in voting violates both the Hawaii Constitution and the United States Constitution. The district court agreed, granting summary judgment for Burdick on the federal constitutional issue. The district court issued an injunction ordering the defendants to provide for write-in voting in the 1986 general election.

The defendants appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The defendants obtained a stay pending appeal.

The appeal was argued before the court of appeals on August 13, 1986. On May 17, 1988, the appellate court entered its opinion vacating the district court's judgment. The court of appeals remanded the case to the district court with instructions to the district court to abstain from deciding the federal constitutional issue pending a determination by the courts of the State of Hawaii whether Hawaii's law permits or requires write-in voting.

If the Hawaii Supreme Court rules that Hawaii law requires write-in voting or in the absence of such a statute, such right arises from the Hawaii Constitution, there will be no need to decide the federal constitutional ques-

tion raised in plaintiff's complaint. Similarly, if the Hawaii Supreme Court rules that Hawaii law permits write-in voting, and if State election officials then provide for such voting, there will be no need to decide the federal constitutional question.

For the foregoing reasons the above issues of Hawaii law are determinative of the cause within the meaning of Haw. R. App. P. 13. Should the Hawaii Supreme Court answer any or all of the certified questions, any party may transmit the same forthwith to this court and may initiate such further proceedings as are consistent with the Hawaii Supreme Court's decision and with the court of appeals mandate.

III. CERTIFIED QUESTIONS

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

IV. CONCLUSION

Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court consider the above questions of Hawaii law and, if appropriate, answer the same by written opinion.

DATED: Honolulu, Hawaii, August 9, 1988

/s/
HAROLD M. FONG
United States District Judge

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

ALAN B. BURDICK,
Plaintiff-Appellee,

v.

MORRIS TAKUSHI, Director of Elections,
State of Hawaii; JOHN WAIHEE, Lieuten-
ant Governor, State of Hawaii,
Defendants-Appellants.

Nos. 86-2689, 86-2703

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

Argued and Submitted Aug. 13, 1987

Decided May 17, 1988

Steven S. Michaels, Deputy Atty. Gen., State of
Hawaii, Honolulu, Hawaii, for defendants-appellants.

Mary Blaine Johnston, Brown, Johnston and Day,
Honolulu, Hawaii for plaintiff-appellee.

Appeal from the United States District Court for the
District of Hawaii.

Before NORRIS and NOONAN, Circuit Judges, and
SMITH,* District Judge.

NORRIS, Circuit Judge:

In May 1986, Appellee Burdick notified Appellants
Takushi and Waihee (Hawaii's Director of Elections and
Lieutenant Governor, respectively) that he wished to cast

* The Honorable Russell E. Smith, United States District Judge for
the District of Montana, sitting by designation.

a write-in vote in the upcoming September primary. After consulting with the State Attorney General, appellants informed Burdick that Hawaii election laws do not provide for write-ins and that such votes would be disallowed or ignored. Burdick filed suit in federal district court claiming that in the upcoming primary and in future primaries and general elections he wished to vote for persons whose names would not appear on the printed ballot and that a ban on such write-in voting violates the United States Constitution. The district court agreed and granted summary judgment for Burdick.

Appellants argue that the district court have abstained from deciding the merits of Burdick's constitutional challenge because it is unclear whether Hawaii's election laws prohibit write-in voting.¹ We agree.

The Supreme Court has made it clear that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal question can be decided." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984)(citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)). Our circuit has adopted a three-part test to determine whether *Pullman* abstention is warranted. First, the proper resolution of the state law question at issue must be uncertain. Second, a definitive ruling on the state issue must potentially obviate the need for constitutional adjudication by the federal court. Third, the complaint must touch upon "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."

¹ Although appellants raise this argument for the first time on appeal, *Pullman* abstention is not waivable by the parties and thus the issue is properly before us. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11, 97 S.Ct. 1898, 1904 n. 11, 52 L.Ed.2d 513 (1977).

Bank of America Nat'l Trust and Savings Assoc. v. Summerland City. Water Dist., 767 F.2d 544, 546 (9th Cir. 1985)(quoting *Canton v. Spokane School Dist.*, No. 81, 498 F.2d 840, 845 (9th Cir. 1974).

With respect to the first criterion, the course of this litigation makes it plain that the question whether Hawaii's election law prohibits write-in voting is an unsettled question of state law. At some time or other, each party seems to have argued both sides of the coin: either that Hawaii's ban on write-in voting is mandated by statute or that the ban is not statutory, but rather arises solely from the administrative policy of state election officials. See Appellants' Opening Br. at 48; Appellee's Br. at 36-38. Curiously, the district court and the appellee (in his current interpretation) are at odds on the issue. The district court concluded that "plaintiff's complaint arises not from any specific Hawaii law, but from defendants' interpretation of that law." Order of September 29 at 4. Yet, on appeal, appellee urges this court to treat Hawaii's prohibition on write-in voting as statutorily based. Appellee's Br. at 38.

Such confusion is hardly surprising. Hawaii's election laws are devoid of any reference to write-in voting. Although taken collectively several sections of the Hawaii elections code may be read to prohibit write-ins these sections may also be read as merely foreclosing ballot access to write-in candidates while placing no restrictions on the right of voters to cast write-in ballots for the candidates of their choice.²

² Hawaii Rev. Stat. §12-1 requires that "All candidates for elective office, except as provided for in section 14-21 [for Presidential Electors], shall be nominated in accordance with this chapter and not otherwise." Section 12-2 specifies that "No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary." Section 16-25 provides that "Each ballot shall be counted . . . as to all (continued...)"

We agree with the district court, Order of October 8 at 10-12, that *Jensen v. Turner*, 40 Haw. 604 (1954), which appellants cite for the proposition that Hawaii has never allowed write-in voting, does not provide a controlling interpretation of Hawaii law. The sole question before the Hawaii court in *Jensen* was whether an act covering two subject matters, machine voting and write-in voting, violated Title 45 of the Organic Act which requires that each law shall "embrace but one subject, which shall be encompassed in its title." Since the title of the act at issue did not mention write-in voting, the *Jensen* court struck down the write-in voting portion of the law. Although the Court assumed that Hawaii law prohibited write-in voting, that assumption was wholly unnecessary to the decision of the case and was made in the context of Hawaii's old election statutes, not those currently in effect.

In sum, neither the plain language of Hawaii statutes nor any definitive judicial interpretation of those statutes establishes that the Hawaii legislature has enacted a ban on write-in voting. Especially considering the ease with the Hawaii legislature could have expressly authorized such a ban, if intended, we decline to find by implication a statutory prohibition on write-in voting.

Faced with this lack of clear legislative direction, the district court treated Burdick's claim not as a facial challenge to a statutory prohibition on write-in voting, but as a §1983 action against individual state election officials for the deprivation of Burdick's constitutionally protected right to cast a write-in ballot. Order of September 29 at 4. Ordinarily, we would agree that a plaintiff may sue state officials under §1983 for the alleged deprivation of

² (...continued)

the candidates" And Section 16-26(1) further provides that ballots which contain "any mark or symbol contrary to the provisions of law" shall be considered "questionable" and set aside uncounted.

his constitutional rights regardless of whether the state law upon which those officials based their actions was susceptible of clear interpretation. In this case, however, the actions of the defendant state officials are inseparable from the state laws underlying their actions. Defendants Takushi and Waihee claim no independent authority or discretion to determine whether Hawaii provides for the casting and counting of write-in votes. Their opinion that Hawaii law prohibits write-in voting was, it appears, based solely on their reading of the relevant statutes and in no way reflected an exercise of executive authority separate from their duty to implement the election rules established by the legislature.

Under the circumstances, a definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitution question raised by Burdick's claim. If the Hawaii state courts were to decide that Hawaii law permits write-in voting -- a not insubstantial possibility as we read Hawaii law -- then we may presume that Hawaii election officials would administer the election laws accordingly. Thus, the second prong of our abstention test has been satisfied.

Finally, this case does touch upon "a sensitive area of social policy" into which federal courts should intrude with great reluctance. State election codes are the product of careful consideration at the local level about how to ensure fair and orderly elections. The authority of states to enact such codes derives from the Constitution itself. See Article I, Sec. 4, cl. 1. Federal courts should refrain from deciding the constitutionality of state election laws when reasonable alternatives to such adjudication are available.

In conclusion, we hold that this is an appropriate case for *Pullman* abstention. The state laws which lie at the heart of this case are "fairly subject to an interpreta-

tion which will render unnecessary' adjudication of the federal constitutional question." *Hawaii Housing Auth.*, 467 U.S. at 236, 104 S.Ct. at 2327 (quoting *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965)). Accordingly, we vacate the district court's judgment and remand with instructions to abstain from deciding the federal constitutional issue in this case pending a determination by the state courts of the question whether Hawaii election laws permit write-in voting. See *Kollsman v. City of Los Angeles*, 737 F.2d 830, 837 (9th Cir. 1984).

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

ALAN B. BURDICK,	)	CIVIL NO. 86-
	)	0582
Plaintiff,)	
)	
vs.)	
)	
MORRIS TAKUSHI,)	
Director of Elections, State)	
of Hawaii, et al.,)	
)	
Defendants.)	
)	

**ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT AND FOR PERMANENT INJUNCTION**

Plaintiff's Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief came on for hearing before this court on September 29, 1986. Mary Blaine Johnston and Alan Burdick appeared on behalf of plaintiff, and Lawrence Hines and Charlene Aina appeared on behalf of defendants. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

The facts of this case are simple and undisputed. Hawaii law makes no provision for the casting or the counting of write-in votes on ballots in its statewide elections. In early June 1986, plaintiff made known his desire to cast a write-in vote in the primary election scheduled to be held on September 20, 1986. Defendants, the Director of Elections and the Lieutenant Governor (who serves as the Chief Elections Officer), consulted with the office of the State Attorney General and

then advised plaintiff on July 11, 1986 that write-in votes will continue to be disallowed or ignored.

This lawsuit was filed on August 21, 1986. The court granted a motion to shorten time on the hearing of the instant motion on September 11, 1986. On September 20, 1986, the State held its primary election. As a result of that election, plaintiff states that in some electoral contests he wishes to cast a write-in vote in the general election now scheduled to be held on November 4, 1986, some 36 days from the date of the hearing of the instant motion.

Because the facts are undisputed, the court first considers the motion for summary judgment. If plaintiff is entitled to judgment as a matter of law pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, that motion will be dispositive and the court need not engage in the balancing test by which motions for preliminary injunctive relief are judged.

A. Laches

Defendants first argue that plaintiff is barred from bringing this suit by the doctrine of laches. In order to prove laches, defendants must show (1) an inexcusable delay by the plaintiff in asserting his rights, and (2) undue prejudice to the defendant as a result. *Knox v. Milwaukee County Board of Elections Commissioners*, 581 F.Supp. 399, 402-03 (E.D. Wis. 1984). If plaintiff could have brought suit earlier but improperly delayed, and if an injunction would delay the election, disenfranchise absentee voters or cause widespread confusion and chaos in the electoral process, injunctive relief will be denied. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Fishman v. Schaffer*, 429 U.S. 1325 (1976); *Populist Party v. Herschler*, 746 F.2d 656, 658 (10th Cir. 1984); *Knox, supra*; *Maddox v. Wrightson*, 421 F.Supp. 1249 (D. Del. 1976).

Defendants argue that plaintiff had standing to bring this action months ago, citing to *Joyner v. Mofford*, 706

F.2d 1523, 1526 (9th Cir. 1983). The court is not persuaded that the facts support such a charge. Hawaii law is silent on the right to cast a write-in vote, and plaintiff properly enquired of defendants (prior to bringing the action into court) whether he would be able to do so in a timely fashion. Not until July 11, 1986 -- slightly more than a month before the complaint was filed -- did defendants definitively respond.¹ Not until July 28, 1986, the day after the filing deadline for the primary election, did plaintiff know with certainty that he wanted to cast a write-in vote in November. In addition, through no fault of plaintiff's, the hearing of this motion was delayed almost three weeks by order of the court.

The court recognizes that an adverse decision at this juncture would undoubtedly cause some inconvenience to election officials. Nevertheless, defendants have not shown that plaintiff improperly delayed in bringing this action. Moreover, they have failed to demonstrate undue prejudice to themselves. The affidavit of Dwayne Yoshida submitted by defendants establishes that the turnaround time for printing absentee ballots is less than a week; the time required for printing all ballots is less than four weeks. If this court should rule in plaintiff's favor, the court is confident that defendants would be able to accommodate any requirement that they provide for write-in votes.

¹ Defendants contend plaintiff should have known that the office of the Lieutenant Governor is without the authority to adjudicate constitutional questions, and that plaintiff should have filed suit immediately. This argument begs the question. Plaintiff could reasonably expect that defendants would read the election laws as permitting write-in votes, thus dispensing with the need for an adversarial proceeding.

B. Merits of the Action

The ultimate issue in this case is whether an individual has a constitutional right to have his write-in vote accepted and tallied in the election. This court therefore finds that defendants' characterization of the issue as simply an equal protection question is inapt. That all Hawaii voters are equally burdened by the inability to cast a write-in vote is of no moment; the proper focus is on the fact that petitioner's ability to vote for the candidate of his choice is circumscribed by defendants' interpretation and application of the election laws.

Because plaintiff's complaint arises not from any specific Hawaii law, but from defendants' interpretation of that law, the court will consider this case as an action brought pursuant to 42 U.S.C. §1983, to redress the deprivation of civil rights under color of state law. Plaintiff alleges that defendants have violated his First Amendment right (applicable to the states through the incorporation provision of the Fourteenth Amendment) of expression and association.

The Supreme Court has held recently that constitutional challenges to specific provisions of state election laws should be governed by a balancing test. *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983). Under this test,

... a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those

interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789, 1570. Because plaintiff here challenges a specific interpretation of the election law, the *Anderson* test applies. This court will accordingly weigh the asserted injury against the justifications offered for burdening plaintiff's rights.

The right to vote in this society is so fundamental as almost to dispense with the need for discussion. "What the Constitution condemns are restrictions that, without compelling justification, significantly encroach upon the rights to vote and to associate for political purposes." *Unity Party v. Wallace*, 707 F.2d 59, 62 (2d Cir. 1983). Defendants in this case have adopted the position that plaintiff may legitimately vote only for a candidate whose name appears on the ballot, or for no one at all. However,

[t]he electoral process is a matter of a majority of qualified voters selecting a candidate to fill a political office and a state cannot arbitrarily impair the freedom of choice which a qualified voter may exercise on election day.

Socialist Labor Party v. Rhodes, 290 F.Supp. 983, 987 (S. D. Ohio (three-judge court), *aff'd* in part, *mod.* in part, *sub nom. Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). When a voter does not choose to vote for any of the candidates listed, a write-in ballot permits him to exercise effectively his individual constitutionally protected franchise. *Id.*

A ban on write-ins affects the right to vote in two ways. First, it may prevent a candidate preferred by a majority of voters from winning election, especially

where significant political changes have occurred between the primary and the general elections.² Second, and more basically, it prevents individual voters from casting ballots for their preferred candidates, whether or not those candidates have any chance of winning election. *Canaan v. Abdelman*, 40 Cal.3d 703, 221 Cal. Rptr. 468, 476 (1985).

It is important to note that plaintiff is not asking that his candidate's name be placed on the ballot, but only that plaintiff be allowed to vote for the candidate of his choice. Defendants argue that "not all restrictions regarding who may be a candidate or who voters may vote for, are constitutionally suspect." This analysis views the issue from the wrong side. A ban on write-in votes strikes directly at the right to vote, irrespective of the actions of a candidate in failing to qualify for placement on the ballot. This court focuses today only on the rights of the voter, and not on those of the candidate. The governmental interests which have been held to justify restrictions on the right to be listed as a candidate are not applicable to write-in candidacy. *Canaan*, *supra*,

² Such an occurrence is not as farfetched as it might appear. The court takes note that, in Hawaii, the frontrunning candidate for governor in the recently-held Democratic primary election attributed his defeat to a "smear" campaign launched by unknown sources on the eve of the election. The office of the State Attorney General is currently investigating the dissemination of a confidential report linked to the smear campaign. Conceivably, if the results of that investigation are made public before the upcoming general election, the potential political backlash could have a considerable effect on voters' desire to cast write-in votes in that or in other electoral contests.

at 715.³

Defendants correctly state that the Supreme Court has not specifically defined a right to cast a write-in vote. Nevertheless, in two cases related to this issue, the Court noted in upholding other restrictions that write-in voting was available as an alternative. See *Jenness v. Fortson*, 403 U.S. 431, 434, 91 S.Ct. 1970, 1972 (1971); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). A strong argument could therefore be made that Supreme Court authority implies a right to a write-in vote. Indeed, the Court of Appeals for the Second Circuit has explicitly relied on the write-in alternative to find a restriction valid. *Unity Party*, *supra*, at 63.

Looking exclusively at the effect on the individual voter and ignoring the potential rights of candidates -- or even of voters to place a particular name on the ballot -- this court finds that plaintiff has shown that defendants propose to inflict substantial injury to his First Amendment rights. Against this burden, the court must weigh the following governmental interests identified by defendants: (1) ensuring that all candidates who run for office in the general election satisfy all statutory requirements for the office sought and are willing to serve; (2) allowing the public adequate time to evaluate and investigate the candidates' qualifications; and (3) protecting the integrity of the State's electoral process by minimizing errors committed by voters and ballot handlers.

The first two of these interests were considered at length and rejected by the California Supreme Court in

³ See also *Kamins v. Board of Elections, District of Columbia*, 324 A.2d 187 (D.C. App. 1974). This court will therefore disregard defendants' authority upholding restrictions on the printing of a candidate's name on the ballot. See, e.g., *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985); *Belluso v. Poythress*, 485 F.Supp. 904 (N.D. Ga. 1980).

Canaan, supra.⁴ This court will reach the same conclusion in fewer words. First, allowing write-in voting does not mean that a candidate who cannot meet other qualifications will be allowed to take office. The State certainly retains the ability to reject candidates for any number of valid reasons. Nevertheless, such an objective can be achieved by less restrictive alternatives than by foreclosing the right of the voters to exercise their freedom of choice. The court finds any such effort to dissuade voters from casting votes, simply because a candidate will not ultimately serve, to be unduly paternalistic.

Second, this court has held recently that the State does have a legitimate interest in ensuring that the voters have time to evaluate the merits of any given candidacy. See *Hankins v. State*, 639 F. Supp. ____ (D. Hawaii 1986). Yet, such an interest is not met by a blanket prohibition on write-in votes. The write-in candidate is already at a severe disadvantage when a voter enters a voting booth, because the candidate's name does not appear on the ballot. The voter must be familiar with the candidate -- at least to the extent of knowing his name -- before being able to cast a vote for that candidate. This court considers extremely remote the possibility that an unknown write-in candidate will win election.

The third interest cited by defendants is the protection of the integrity of Hawaii's electoral process. The defendants in *Canaan* did not make such an argument, which demonstrates nothing more than a reluctance to adapt to changing conditions. Defendants are apparently

⁴ Defendants submit that plaintiff's reliance on state court decisions, and the paucity of relevant federal authority, indicates that "the issue lacks constitutional proportion." This court disagrees. That federal courts have rarely been called upon to decide this issue suggests that voters have been successful in seeking relief in the state courts in those few jurisdictions which do not recognize the right to cast a write-in vote. For a catalogue of federal and state decisions discussing this issue, see *Canaan, supra*, at 725 n.22.

concerned that, if the court orders inclusion of space for write-in votes on the ballot, they will not have time to test the new system for flaws. Even if they can make such tests, they argue that write-in balloting will encumber the process.

While recognizing the inconvenience such an order would cause, this court is certain that the defendants possess the resources to implement and to execute an accommodation for write-in balloting in a timely and effective manner. Obviously, the provision for space on the ballot itself will involve no more than a relatively minor change in the order submitted to the printer.

Moreover, as to the processing and counting of the write-in ballots,⁵ defendants should be able to design and to implement a method of recording such votes within the time remaining before the general election. Defendants must remember that they would not be asked to strike out on some uncharted path, but rather to conform Hawaii's balloting process with that used by the majority of jurisdictions in the nation. Undoubtedly, defendants' counterparts in other states would prove helpful in explaining to defendants how to cope with the technical problems of processing write-in votes.

This court is likewise not persuaded by the other concerns raised by defendants: possible ambiguity as to the write-in candidate's identity and time spent in counting the ballots. An order mandating the provision for write-in ballots would not mean, of course, that the State

⁵ Defendants paint an apocalyptic picture of election officials forced to count three million ballots by hand in the upcoming general election. The court does not share defendants' gloomy prognostication. First, the court will take judicial notice that less than 400,000 persons are registered to vote in the upcoming election, not all of whom will actually vote. Second, the number of write-in votes itself can hardly be expected to be significant. The ability to cast such a vote is a privilege, not an obligation.

could not void ballots cast for unidentifiable candidates. As to any delay caused by the hand-counting of write-in votes, that fact alone -- if it is true -- is insufficient justification for abridging First Amendment freedoms.

The administrative difficulty outlined by defendants is apparently one which can be solved without impeding the election machinery. *See Kamins, supra*, at 193. Defendants oppose the procedural change because Hawaii has not allowed write-in voting since it became a state in 1959, and because it has used electronic key-punch machines for the last 14 years. Nevertheless, inertia is not a legitimate reason for trammeling constitutional rights. Defendants have an obligation to prove receptive when a change is in the beneficial interest of Hawaii residents. The availability of a write-in candidacy not only provides the flexibility to deal with unforeseen political developments and to help ensure that the voters are given meaningful options on election day, *Canaan, supra*, at 719, but it is also constitutionally required.

Of course, it goes virtually without saying that the ability to cast a write-in vote includes a right to have that vote considered. To afford a voter the opportunity to write in the name of his candidates, and then to ignore that vote, is to offer a hollow right indeed. *See Canaan, supra*, at 718. The State must not only provide for write-in votes, it must also count, record, and consider votes so cast equally with all others cast in the election. *Socialist Labor Party, supra*, at 992.

This court has weighed the burden on plaintiff's rights against the interests asserted by the defendants and finds that the refusal to permit write-in voting violates the plaintiff's constitutionally guaranteed freedom of expression and association. Defendants' speculative arguments about the possible consequences of allowing write-in voting do not justify burdening the right to vote. *Canaan, supra*, at 723.

Because plaintiff has demonstrated that he is entitled to prevail in this case as a matter of law, summary judgment is appropriate. Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for summary judgment be, and the same is, GRANTED. Judgment shall be entered in favor of plaintiff and against defendants. Because plaintiff has demonstrated that he is entitled to injunctive relief, IT IS FURTHER ORDERED that the motion for a permanent injunction be GRANTED.

IT IS FURTHER ORDERED that defendants comply immediately with the terms of this order by causing ballots for the November 1986 general election to provide for the casting of write-in votes equal to the total number of candidates to be elected in each electoral contest, and that defendants provide for the counting, recording, and tabulation of such write-in votes. The court recognizes that one or more write-in candidates may ultimately garner a majority or a plurality of the votes cast. At this time, however, the court does not rule upon the eligibility of such a person or persons to take office.

Upon the representation by defense counsel that defendants will voluntarily comply with plaintiff's request for dissemination of information to the public regarding the right to cast write-in votes, this court will make no findings as to plaintiff's right to demand the same. As to plaintiff's request for attorneys' fees pursuant to 42 U.S.C. §1988, plaintiff is directed to file a separate motion requesting such fees.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 29, 1986

/s/
HAROLD M. FONG
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii Revised Statutes, Section 12-1 provides:

§12-1 Application of chapter. All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise.

Hawaii Revised Statutes, Section 12-2 provides, in relevant part:

. . . No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary.

Hawaii Revised Statutes, Section 12-41 provides:

§12-41 Result of election. (a) The person or persons receiving the greatest number of votes at the primary or special primary as a candidate of a party for an office shall be the candidate of the party at the following general or special general election but not more candidates for a party than there are offices to be elected; provided that any candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall, after the primary or special primary election, be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.

(b) Any nonpartisan candidate receiving at least ten percent of the total votes cast for the office for which the person is a candidate at the primary or special primary, or a vote equal to the lowest vote received by the partisan candidate who was nominated in the primary or special primary, shall also be a candidate at the following election; provided that when more nonpartisan candidates qualify for nomination than there are offices to be voted for at the general or special general election, there shall be certified as candidates for the following election those receiving the highest number of votes, but

not more candidates than are to be elected.

Hawaii Revised Statutes, Section 16-1 provides:

§16-1 Voting systems authorized. The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.

Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in one or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12.

Hawaii Revised Statutes, Section 16-22 provides:

§16-22 Marking. The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting

by paper ballot.

Hawaii Revised Statutes, Section 16-26 provides:

§16-26 Questionable ballots. A ballot shall be questionable if:

- (1) A ballot contains any mark or symbol whereby it can be identified, or any mark or symbol contrary to the provisions of law; or
- (2) Two or more ballots are found in the ballot box so folded together as to make it clearly evident that more than one ballot was put in by one person, the ballots shall be set aside as provided below.

Each ballot which is held to be questionable shall be endorsed on the back by the chairman of precinct officials with the chairman's name or initials, and the word "questionable." All questionable ballots shall be set aside uncounted and disposed of as provided for ballots in section 11-154.

③
No. 91-535

Supreme Court, U.S.
FILED

NOV 15 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE, Lieutenant Governor of
Hawaii; and BENJAMIN CAYETANO, in his capacity
as Lieutenant Governor of the State of Hawaii,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether Petitioner's filing of a motion to extend the time for rehearing pursuant to Fed. R. App. P. 40 after the time for seeking such rehearing below had expired, which motion was granted, renders the otherwise untimely petition for rehearing below sufficient to toll the time in which certiorari must be sought?
2. Whether review of the issue presented by Petitioner is barred by 28 U.S.C. § 1738, in that Petitioner, in presenting his claims to the Supreme Court of Hawaii on questions certified thereto, exceeded the issues justifying certification, and whereafter the state court rejected on the merits Petitioner's arguments that Hawaii's constitutional provisions paralleling the federal Constitution void the law at issue here?
3. Whether Petitioner, who consistently refuses to identify any particular write-in candidate for whom he desires to vote, has prudential standing in this case?
4. Whether, in light of the opportunities voters in Hawaii enjoy to cast, and have counted and published, votes for their preferred candidates, Hawaii's election laws are federally void because write-in votes may not be cast at Hawaii's biennial elections?
5. Whether the Court of Appeals properly refused to order an election scheme mandating an accounting of write-in votes which had no legal effect and which would require Hawaii to subsidize protest speech?

PARTIES BEFORE THIS COURT

Respondent Morris Takushi is and at all relevant times has been the Director of Elections of the State of Hawaii, charged by law with the preparation of the ballots for Hawaii elections.

Respondent John Waihee was, in 1986, when D.C. Civil No. 86-0582 was filed in the District of Hawaii, Lieutenant Governor of Hawaii and the State of Hawaii's chief elections officer. Respondent Waihee was elected Governor in 1986, and was succeeded in office by Respondent Benjamin Cayetano. Respondent Cayetano, along with Respondent Takushi, was named as a defendant in D.C. Civil No. 88-0365, and was re-elected to office in November, 1990. All respondents were named in the courts below solely in their official capacities and so appear in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BEFORE THIS COURT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. How the Hawaii Election Code Works	3
B. The Proceedings Below	12
REASONS FOR DENYING THE WRIT	16
A. The Ninth Circuit's Reversal of the District Court's Unprecedented Injunction Plainly Comports with This Court's Rulings Circumscribing Review of State Electoral Frameworks	18
B. There is No True Conflict Among the Lower Appellate Courts, and any Perceived Conflict is Not Sufficient to Warrant the Expenditure of the Court's Scarce Resources	25
C. Procedural Obstacles Cloud the Petition and Independently Warrant Denial of the Writ ...	28

TABLE OF AUTHORITIES

Page

CASES:

<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	19
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	4, 8, 21
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	passim
<i>Bowman v. Loperena</i> , 311 U.S. 262 (1941)	29
<i>Bradley v. Mandel</i> , 449 F. Supp. 983 (D. Md. 1978)	8
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985)	20
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	10
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	10
<i>Burdick v. Takushi</i> , 70 Haw. 498, 776 P.2d 523 (1989)	3, 14
<i>Burdick v. Takushi</i> , 737 F. Supp. 582 (D. Haw. 1990)	14
<i>Burdick v. Takushi</i> , 846 F.2d 547 (9th Cir. 1988)	3, 13
<i>Burdick v. Takushi</i> , 927 F.2d 469 (9th Cir. 1991)	15, 16
<i>Burdick v. Takushi</i> , 937 F.2d 415 (9th Cir. 1991)	3, 16
<i>Canaan v. Abdelnour</i> , 40 Cal. 2d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985)	4, 13, 27, 28
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	4, 22
<i>Democratic Party v. Wisconsin</i> , 450 U.S. 107 (1981)	4
<i>Dixon v. Maryland State Board</i> , 878 F.2d 776 (4th Cir. 1989)	passim
<i>England v. Medical Examiners</i> , 375 U.S. 411 (1964)	13, 29, 30

TABLE OF AUTHORITIES - Continued

Page

<i>Erum v. Cayetano</i> , 881 F.2d 689 (9th Cir. 1989) ..	1, 3, 10
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989)	25
<i>Fasi v. Cayetano</i> , 752 F. Supp. 942 (D. Haw. 1990) (en banc)	4, 11, 22
<i>FTC v. Minneapolis-Honeywell Co.</i> , 344 U.S. 206 (1952)	29
<i>Gebelein v. Nashold</i> , 406 A.2d 279 (Del. Ch. 1979)	4
<i>Georges v. Carney</i> , 691 F.2d 297 (7th Cir. 1982)	25
<i>Government Employees v. Windsor</i> , 353 U.S. 364 (1955)	29
<i>Grogan v. Graves</i> , No. 90-2378-0 (D. Kan. Oct. 30, 1990)	28
<i>Hall v. Simcox</i> , 766 F.2d 1171 (7th Cir.), cert. denied, 474 U.S. 1006 (1985)	18, 28
<i>Harden v. Board of Elections</i> , 74 N.Y.2d 796, 544 N.E.2d 605, 545 N.Y.S.2d 686 (1989)	18, 28
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984)	13
<i>Hayes v. Gill</i> , 52 Haw. 251, 472 P.2d 872 (1970)	11
<i>Holstein v. Young</i> , 10 Haw. 216 (1896)	3, 10
<i>Hustace v. Doi</i> , 60 Haw. 282, 588 P.2d 915 (1978) ..	1, 3, 10
<i>Jackson v. Norris</i> , 195 A. 576 (Md. 1937)	17, 26
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	17, 22
<i>Jenson v. Turner</i> , 40 Haw. 604 (1954)	1, 3
<i>Legislature of California v. Eu</i> , 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991)	18, 28

TABLE OF AUTHORITIES – Continued

	Page
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	22, 27
<i>Lujan v. National Wildlife Foundation</i> , 110 S. Ct. 3177 (1990)	19
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	4
<i>McClain v. Meier</i> , 851 F.2d 1045 (8th Cir. 1988). 7, 18, 28	
<i>Mt. Healthy City Board of Education v. Doyle</i> , 429 U.S. 278 (1977)	20
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	passim
<i>New York State Club Ass'n v. City of New York</i> , 487 U.S. 1 (1988)	20
<i>Paul v. Indiana Election Board</i> , 737 F. Supp. 616 (S.D. Ind. 1990)	28
<i>Rainbow Coalition v. Oklahoma State Election Board</i> , 844 F.2d 740 (10th Cir. 1988)	8, 18, 28
<i>Rodriguez v. Popular Democratic Party</i> , 457 U.S. 1 (1982)	4, 12
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	4, 11
<i>Santos v. State</i> , 64 Haw. 648, 646 P.2d 962 (1982)	30
<i>Socialist Labor Party v. Rhodes</i> , 290 F. Supp. 983 (D. Ohio 1968)	18, 22, 23
<i>State Administrative Board of Election Laws v. Calvert</i> , 272 Md. 659, 327 A.2d 290 (1974)	11, 24
<i>Stevenson v. State Board</i> , 638 F. Supp. 547 (N.D. Ill. 1986)	6
<i>Stevenson v. State Board</i> , 794 F.2d 1176 (7th Cir. 1986)	4, 20, 24

TABLE OF AUTHORITIES – Continued

	Page
<i>Stiles v. Blunt</i> , 912 F.2d 260 (8th Cir. Aug. 24, 1990)	19
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	4, 10, 24
<i>Sullivan v. Grasso</i> , 292 F. Supp. 411 (D. Conn. 1968) .18, 23	
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	4, 6, 9, 11
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	20
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	24
<i>Wicker v. Board of Education</i> , 826 F.2d 442 (6th Cir. 1987)	30
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	6, 10, 17
<i>Zielasko v. Ohio</i> , 873 F.2d 957 (6th Cir. 1989)	28
CONSTITUTIONAL PROVISIONS:	
U.S. Const., art. I, § 4	2
U.S. Const., First Amendment	21, 25, 29
U.S. Const., Tenth Amendment	2
U.S. Const., Fourteenth Amendment	passim
Haw. Const., art. I, § 4 (1978)	2, 13
Haw. Const., art. I, § 5 (1978)	2, 13
Haw. Const., art. III, § 4 (1988)	8, 12
STATUTES:	
28 U.S.C. § 1738 (1988)	i
Ala. Code § 17-7-1(a)(3)	6

TABLE OF AUTHORITIES - Continued

Page

Alaska Stat. § 15.25.070 (1988)	5
Alaska Stat. § 15.25.160	6
Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989)	5
Ariz. Rev. Stat. Ann. § 16.341.E (1984)	6
Ark. Stat. Ann. § 7-5-205 (Supp. 1989)	5
Cal. Elec. Code § 6831 (West 1977 & Supp. 1989)	6
Cal. Elec. Code § 7300 (West 1977 & Supp. 1990)	5
Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989)	5
Conn. Gen. Stat. § 9-373(a) (1989)	5
Conn. Gen. Stat. § 9-453(d) (1989)	6
Del. Code Ann. tit. 15, § 3002(b)	7
Fla. Stat. § 101.011(6) (1989)	5
Fla. Stat. Ann. § 9-1-3.021(3)	7
Ga. Code Ann. §§ 21-2-170, 32-1010	7
Ga. Code Ann. § 34A-915 (Harrison Supp. 1988)	5
Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988)	5
Haw. Rev. Stat. § 11-61 (1985 & Supp. 1990)	7, 9
Haw. Rev. Stat. § 11-62 (1985 & Supp. 1990)	6, 7
Haw. Rev. Stat. § 11-64 (1985 & Supp. 1990)	7
Haw. Rev. Stat. § 11-113 (1985 & Supp. 1990)	6
Haw. Rev. Stat. § 11-117 (1985 & Supp. 1989)	12

TABLE OF AUTHORITIES - Continued

Page

Haw. Rev. Stat. § 11-118 (1985 & Supp. 1989)	12
Haw. Rev. Stat. § 12.2.5 (1985)	8
Haw. Rev. Stat. § 12-3(1) (1985)	9
Haw. Rev. Stat. § 12-3(7) (1985)	11
Haw. Rev. Stat. § 12-4 (1985)	9
Haw. Rev. Stat. § 12-5 (1985)	9
Haw. Rev. Stat. § 12-6 (1985)	8
Haw. Rev. Stat. § 12-7 (1985)	9
Haw. Rev. Stat. § 12-22 (1985)	9
Haw. Rev. Stat. § 12-41 (1985)	8, 9, 12, 24
Haw. Rev. Stat. § 17-3 (1985)	12
Haw. Rev. Stat. § 17-4 (1985)	12
Haw. Rev. Stat. § 17-5 (1985)	12
Idaho Code § 34-702A (Supp. 1989)	5
Ind. P.L. No. 5-1986, § 61	5
Ind. Code Ann. § 3-8-6-3	7
Kan. Stat. Ann. § 25-213 (1986)	5
Ky. Rev. Stat. § 117.265(3)	5
La. Elec. Code § 441	7
Mass. Gen. L. Ann. ch. 53, § 8-6	7
Md. Ann. Code, art. 33, § 5-3(f) (1986)	5
Md. Elec. Code Ann. art. 33, § 4B-1(h)	7
Md. Elec. Code Ann. § 4D-1 (Supp. 1989)	5, 26

TABLE OF AUTHORITIES – Continued

	Page
Md. Elec. Code Ann. art. 33, § 4B-1(h).....	7
Mich. H.B. 4010 (1987 Sess.)	7
Minn. Stat. § 204B.36(2) (1988).....	5
Mo. Rev. Stat. § 115.453(4) (1986)	5
Mo. Ann. Stat. § 9-115.321	7
Mont. Code Ann. § 13-10-211 (1989)	6
Neb. Rev. Stat. § 32-428 (1988).....	5
Nev. Rev. Stat. § 24-293.200	7
Nev. Rev. Stat. § 293.270(2)	5
N.M. Stat. Ann. § 1-8-51 (Supp. 1985).....	7
N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985)	5, 6
N.Y. Elec. Law § 6-164 (McKinney 1978 & Supp. 1990).....	6
N.C. Gen. Stat. § 163-22	7
N.C. Gen. Stat. § 163-151(6)(e) (1987).....	5
Ohio Rev. Code Ann. § 3513.04 (1989)	5
Ohio Rev. Code Ann. § 3513.041 (Anderson 1988)	6
Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989)	5
Or. Rev. Stat. § 23-249.007 (1989).....	6
Or. Rev. Stat. § 23-239.740(a) (1989)	7
Pa. Stat. Ann. tit. 25, § 2911	7

TABLE OF AUTHORITIES – Continued

	Page
S.D. Codified Laws Ann. § 12-7-1 (1982)	7
S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990).....	5
Tex. Code Ann. (Vernon's) § 142.007(1) (1986)	7
Tex. Code Ann. (Vernon's) § 146.002 (1986).....	5
Tex. Code Ann. (Vernon's) § 172.112 (1986).....	5
Utah Code Ann. § 20-7-20 (1984 & Supp. 1990)	6
Wash. Rev. Code Ann. § 29.51.170 (1965 & Supp. 1990).....	6
Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986)	5
Wis. Stat. § 8.16(2) (1987-88)	6
Wis. Stat. § 8.17(3)(a) (1987-88).....	5
Wyo. Stat. § 22-5-304	7
COURT RULES:	
U.S. S. Ct. R. 13.4	29
Fed. R. App. P. 40.....	29
OTHER AUTHORITIES:	
<i>Fundamental Law of Hawaii</i> (1904 ed.).....	3
Haw. H. Stand. Comm. Rep. No. 762-86.....	9

No. 91-535

—◆—
In The
Supreme Court of the United States
October Term, 1991
—◆—

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE, Lieutenant Governor of
Hawaii; and BENJAMIN CAYETANO, in his capacity as
Lieutenant Governor of the State of Hawaii,

Respondents.

—◆—
**Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit**
—◆—

RESPONDENTS' BRIEF IN OPPOSITION
—◆—

Respondents Director of Elections, State of Hawaii,
and the Lieutenant Governor of Hawaii, pray that the
petition for review of the judgment of the United States
Court of Appeals for the Ninth Circuit, entered June
28,1991, be denied.

OPINIONS BELOW

In addition to those cited in the Petition, the deci-
sions of the Supreme Court of Hawaii in *Jenson v. Turner*,
40 Haw. 604 (1954), and in *Hustace v. Doi*, 60 Haw. 282,
588 P.2d 915 (1978), and of the court of appeals in *Erum v.*

Cayetano, 881 F.2d 689 (9th Cir. 1989), are relevant to this case. The April 15, 1991, order extending the time to seek rehearing below is also relevant and appears at our Appendix ("Resp. App.") "A".

JURISDICTION

The judgment of the court of appeals was entered March 1, 1991. A petition for rehearing was mailed on the fourteenth day after judgment, but was not received in the clerk's office until about March 18, 1991. Thereafter, Petitioner moved for, and received, an order from the court below extending the time to file the petition. Resp. App. "A." A response was called for and the petition was denied June 28, 1991. The original opinion was withdrawn, and a new opinion and judgment entered. The effect of these events under Rule 13.4 is briefed *infra*.

Jurisdiction in the district court was allegedly conferred by 28 U.S.C. §§ 1343, 2201, and 2202, and jurisdiction in the court of appeals lay under 28 U.S.C. §§ 1291 and 1292(a). As we dispute whether Petitioner has Article III or prudential standing, the issue of Petitioner's standing is briefed *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Hawaii Constitution and the Hawaii election code (Chapters 11, 12, 16, and 17, Hawaii Revised Statutes ("H.R.S.)) are reprinted in Resp. App. "B."

Article I, § 4, clause 1 of, and the Tenth Amendment to, the United States Constitution, and Article I, §§ 4 and 5 of the Hawaii Constitution are reprinted in Resp. App.

"C." Provisions of the related laws of other States are cited and summarized at pp. 5-7 *infra*.

STATEMENT OF THE CASE

If procedural obstacles do not block review, *see infra* pp. 28-30, the main issue in this case is whether the two-stage process by which Hawaii has elected its political leaders for decades, and which has been unanimously upheld during the past forty years on five separate occasions by the Ninth Circuit and the Supreme Court of Hawaii,¹ is facially void merely because Hawaii, like over twenty other States, does not provide an unlimited "right" to cast "write-in votes" at its elections.

A. How the Hawaii Election Code Works.

Since Hawaii became affiliated with the United States, the method for choosing our elected officials, as is

¹ See *Burdick v. Takushi*, 937 F.2d 415 (9th Cir. 1991); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989); *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989); *Hustace v. Doi*, 60 Haw. 282, 588 P.2d 915 (1978); *Jenson v. Turner*, 40 Haw. 604 (1954); cf. *Burdick v. Takushi*, 846 F.2d 547 (9th Cir. 1988) (refusing on abstention grounds to affirm judgment nullifying ban). Although Hawaii was a constitutional monarchy prior to the Republic which authorized our annexation by the United States, popular elections have existed in Hawaii since at least the 1840 Constitution, which authorized election of a House of Representatives "chosen by the people." Const. Kamehameha III, *Fundamental Law of Hawaii* 6 (1904 ed.). Hawaii's 1842 law made it a crime to vote for "another without his approbation," limiting choices to those willing to serve. Act of Nov. 2, 1842, reprinted in *id.* at 11. The write-in ban in pre-statehood days is chronicled, among other places, in *Holstein v. Young*, 10 Haw. 216 (1896), and *Jenson v. Turner*, 40 Haw. 604 (1954).

the case in most States, has embodied a two part process, a critical stage of which is the primary, in late September, in which voters " 'winnow out and finally reject all but the chosen candidates.' " *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986).

To prevent circumvention of this critical process by late-starting candidates and their surrogates,² protect political parties from "raiding" at the primary,³ give force to a primary mandate for candidates who have no opposition,⁴ ensure voters have time to study the candidates,⁵ vindicate eligibility rules that serve proper goals unrelated to First Amendment concerns,⁶ and otherwise enforce "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself,"⁷ Hawaii, like more than twenty other

² See *Munro*, 479 U.S. at 196; *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Erum*, 879 F.2d at 693; *Stevenson v. State Board*, 794 F.2d 1176, 1177 (7th Cir. 1986) (Easterbrook, J., concurring).

³ See *Tashjian v. Republican Party*, 479 U.S. 208, 219 (1986); *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

⁴ See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982); *Canaan v. Abdelnour*, 40 Cal. 3d 703, 726, 710 P.2d 268, 283, 221 Cal. Rptr. 468, 483 (1985).

⁵ See *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Gebelein v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979).

⁶ See *Clements v. Fashing*, 457 U.S. 957 (1982); *Fasi v. Cayetano*, 752 F. Supp. 942 (D. Haw. 1990) (*en banc*).

⁷ *Munro*, 479 U.S. at 196; *Anderson*, 460 at 788 n.9; *Mandel v. Bradley*, 432 U.S. 173 (1977); *American Party of Texas v. White*, 425 U.S. 767 (1974); *Storer*, 415 U.S. 424 (1974).

States,⁸ regulates its election process by barring the casting, counting, or consideration of votes – including write-in votes – for candidates who do not file their nomination papers on time, prove they are eligible, state a willingness to serve, emerge from the primary, or otherwise show compliance with law.

⁸ Laws of Indiana (Ind. P.L. No. 5-1986, § 61 (repealing Ind. Code § 3-1-23-23 (1977))), Nevada (Nev. Rev. Stat. § 293.270(2)), Oklahoma (Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989)), and South Dakota (S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990)) also ban write-ins. Texas bans write-ins at runoff elections, as does Louisiana. Texas Code Ann. (Vernons') § 146.002 (1986). Washington provides "[t]hat no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary." Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986). New Mexico and Ohio do likewise. See N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985); Ohio Rev. Code Ann. § 3513.04 (1989) (same); see also Ky. Rev. Stat. § 117.265(3) (no write-ins for Presidential electors); Neb. Rev. Stat. § 32-428 (1988) (other particular offices).

Nine other States ban primary write-ins. See Alaska Stat. § 15.25.070 (1988); Fla. Stat. § 101.011(6) (1989); Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988); Kan. Stat. Ann. § 25-213 (1986); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C. Gen. Stat. § 163-151(6)(e) (1987); Tex. Code Ann. § 172.112 (1986); Wis. Stat. § 8.17(3)(a) (1987-88).

At least seventeen States require substantial pre-election registration filings by write-in candidates, including the submission of particular information, as a condition of having any write-in votes counted for them. See Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989); Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 & Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Md. Elec. Code § 4D-1 (Supp. 1989); Mo. Rev. Stat. § 115.453(4)

(Continued on following page)

This modest limit exists in a scheme where candidates may, with no more than twenty-five petition signatures "wage a ballot-connected campaign." *Compare Munro*, 479 U.S. at 196. Indeed, Hawaii guarantees November ballot position to those who gather signatures equal to 1 per cent of the preceding vote, a "lenient" rule. *Williams v. Rhodes*, 393 U.S. 23, 33 n.9 (1968).

Hawaii thus provides three liberal routes to the November ballot. Our "open primary," see *Tashjian v. Republican Party*, 479 U.S. 208, 233 n.11 (1986), is critical to each.⁹

Under the "new party" route (HRS § 11-62), "any group of persons" garnering "signatures of currently registered voters" equal to one percent of the total registered voters in the last general election (*id.* § 11-62(a)) may form a party.¹⁰ Endorsers need not be members of the

(Continued from previous page)

(1986); Mont. Code Ann. § 13-10-211 (1989); N.M. Stat. Ann. § 1-12-19.1 (1985); N.Y. Elec. Law § 6-164 (McKinney 1978 & Supp. 1990); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988); Or. Rev. Stat. § 23-249.007 (1989); Utah Code Ann. § 20-7-20 (1984 & Supp. 1990); Wash. Rev. Code Ann. § 29.51.170 (1965 & Supp. 1990); Wis. Stat. § 8.16(2) (1987-88); see also *Stevenson v. State Board of Elections*, 638 F. Supp. 547, 552 (N.D. Ill. 1986).

⁹ Hawaii's route for Presidential candidates takes into account the unique factors in this national election, and allows the filing of petitions and candidate names up to sixty days prior to the general election. See HRS § 11-113. These provisions are not cited in the Petition, and were not cited much less challenged by Petitioner in any of the courts below.

¹⁰ Alabama (Ala. Code § 17-7-1(a)(3)); Alaska (Alaska Stat. § 15.25.160); Arizona (Ariz. Rev. Stat. Ann. § 16.341.E); California (Cal. Elec. Code § 6831); Connecticut (Conn. Gen. Stat.

(Continued on following page)

"group of persons desiring to qualify" (*id.*), and may sign multiple petitions and vote in the primary of their choice. While a petition must give "names and addresses of the officers of the central committee and of the respective county committees of the political party" and "the party rules," HRS § 11-62(a)(4) (emphasis added), the law does not disqualify a party if, in fact, it has no central committee, county committees, officers, or rules. See HRS § 11-62 (Supp. 1989); *id.* § 11-64. There is no requirement that a party name candidates in more than one race. See HRS § 11-61.

(Continued from previous page)

Ann. § 9-453(d)); Delaware (Del. Code Ann. tit. 15, § 3002(b)); Georgia (Ga. Code Ann. §§ 21-2-170, 32-1010); Michigan (Mich. H.B. 4010 (1987 Sess.)); Missouri (Mo. Ann. Stat. § 9-115.321); South Dakota (S.D. Codified Laws Ann. § 12-7-1); and Texas (Tex. Elec. Code § 142.007(1)), have a 1% rule. Indiana (Ind. Code Ann. § 3-8-6-3); Massachusetts (Mass. Gen. L. Ann. ch. 53, § 8-6); North Carolina (N.C. Gen. Stat. § 163-22); and Pennsylvania (Pa. Stat. Ann. Tit. 25, § 2911), have a 2% rule. Florida (Fla. Stat. Ann. § 9-1-3.021(3)); Maryland (Md. Elec. Code Ann. art. 33, § 4B-1(h)), and Oregon (Or. Rev. Stat. § 23-249.740(a)), have a 3% rule. Louisiana (La. Elec. Code § 441); New Mexico (N.M. Stat. Ann. § 1-8-51); Nevada (Nev. Rev. Stat. § 24-293.200), and Wyoming (Wyo. Stat. § 22-5-304), have a 5% petition requirement. In Hawaii, the 1% rule, in 1986 when this litigation began, required 4,189 signatures. See C.R. 13 in No. 86-0582. In the court below, Petitioner admitted that at least six States, including Arkansas, Illinois, Kentucky, New York, North Dakota, Ohio, and South Carolina, as a result of non-percentage rules, require at least that many signatures for candidates in statewide contests. App. to Appellees' Ans. Br., Nos. 86-2689, 86-2703 (9th Cir. Apr. 1987) (C.R. 31 in No. 86-0582); see also *McClain v. Meier*, 851 F.2d 1045, 1047 (8th Cir. 1988) (7,000 signatures (1.6% rule)).

The filing deadline for parties occurs in mid- to late April. This deadline exists "to verify the validity of signatures on the petitions, to print the [primary] ballots, and if necessary, to litigate any challenges." *American Party of Texas v. White*, 415 U.S. at 787 n.15 (second Wednesday in June); see also *Rainbow Coalition v. State Election Board*, 844 F.2d 740, 744-46 (10th Cir. 1988) (May 31 deadline). The 150-day pre-primary deadline is critical as runaway winners at the primary in county and state legislative races are "elected" at the primary under HRS § 12-41(a) (1985), and Haw. Const. art. III, § 4. Prompt commencement of the primary season assures that voters are informed, and that candidates can be sure that the party under whose banner they wish to run has been fully confirmed.

While the "new party" route emphasizes a more early organization as a trade-off for minimization of the risk of elimination at the primary, numerous minor parties have participated under it at the November ballot stage. Indeed, in Hawaii's milieu, where candidates and parties do not face the "pressure of conducting a petition drive in adverse winter weather," see *Bradley v. Mandel*, 449 F. Supp. 983, 986 (D. Md. 1978), the Libertarian Party, People's Party, Citizen's Party, Independents for Godly Government, Aloha Democratic Party, and Independent Democratic Party have gained party status in Hawaii. See Clerk's Record 48 (No. 86-0582) (Respondents' official reports).

Once a new party is formed, a party candidate need only file a petition to enter that party's primary by late July, 60 days before the primary. The petition must contain twenty-five signatures for statewide and federal office (fifteen signatures for all others). HRS §§ 12-2.5, 12-6. A nominating voter need not pledge support for a

candidate, see *id.* § 12-3, cf. *Tashjian*, 479 U.S. at 225 n.13; nor need the nominator be a party member. HRS §§ 12-3(1), 12-4. Party candidates are selected at an open primary, where they may "campaign among the entire pool of registered voters." *Munro*, 479 U.S. at 197.

Hawaii's second avenue to the November ballot derives from the first and may be called the "established party" route. Parties which garner ten percent in any preceding state-wide or congressional race, or analogous showings in state legislative races, HRS §§ 11-61(b)(1)-(5), are exempted from petitioning. In addition, under 1986 legislation, "if a party qualifies through petition for three consecutive general elections, it will be deemed a political party for the following ten year period." Haw. H. Stand. Comm. Rep. No. 762-86 (Resp. App. 70).

The third route is placement on the nonpartisan primary ballot. Nonpartisans need not have party sponsorship, but run in a separate primary on primary day. HRS § 12-22. Nonpartisans thus need only meet the filing requirements for party candidates (HRS §§ 12-3 - 12-7), including the minimal petition requirements (25 signatures for statewide and federal races; 15 for others). Nonpartisans then may advance under HRS § 12-41, which has been authoritatively interpreted as follows:

The candidate of a qualified party may obtain nomination by securing any number of votes, no matter how few, if they constitute a plurality of votes cast for candidates of that party, while a nonpartisan candidate must receive a minimum number of votes [i.e., 10% of primary vote]. That minimum number, however, can never be more than the number of votes which has been sufficient to nominate a partisan candidate.

Hustace v. Doi, 60 Haw. at 289-90, 588 P.2d at 920. Eight of 26 nonpartisans running qualified for the November ballot from 1976-86, see *Erum, supra*, 881 F.2d at 690 n.2, and it is subject to judicial notice that, in November 1990, there were nonpartisan candidates for Governor/Lieutenant Governor and in mayoral races in the counties of Maui and of the Big Island of Hawaii.

Hawaii election law nonetheless bans "write-in" voting, and, indeed, has done so, with certain rare exceptions which no longer exist, for well over 90 years. See *Jenson v. Turner*, 40 Haw. 604, 613 (1954) ("[t]he privilege to 'write-in' a ballot would radically change both the primary and election laws"). While first viewed as "secur[ing] secrecy of the ballot," *Holstein v. Young*, 10 Haw. 216, 222 (1896), the ban furthers at least three added categories of compelling interests.

First, the ban on write-ins makes clear in two distinct ways that the primary is "'an integral part of the entire election process'" that "'functions to winnow out and finally reject all but the chosen candidates.'" *Munro*, 479 U.S. at 196. Thus, by making the primary count, the ban bars efforts by primary losers and their surrogates to carry intra-party feuds into the general election. *Id.* Like at least nine other states that ban write-ins for "sore-losers" and their supporters, Hawaii, by reserving the general election for "major struggles," *Storer*, 415 U.S. at 734, recognizes the importance of permitting a "winner in the general election [to enter office] with sufficient support to govern effectively." *Id.*; accord, *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Along these lines, the ban ensures that the primary *can* count, by protecting the associational rights of the parties against

true "party raiding" by write-in votes, namely, a scenario where voters and candidates of one party seek to sabotage the results of another party's primary. See *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). Like nine other States that ban primary write-ins, Hawaii operates on the view that such votes are "'inconsistent with the whole theory of primary elections.'" *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 327 A.2d 290, 299 (1974), cert. denied, 419 U.S. 1110 (1975). As parties have the right to solicit independent voters, see *Tashjian*, 479 U.S. at 219, and Hawaii's Constitution mandates an open primary, the ban on write-ins in conjunction with candidate filing requirements, see, e.g., HRS § 12-3(7) (requiring certification that "the candidate is a member of the party"), is not only legitimate, but serves the compelling associational interests of the political parties by preventing last-minute "hostile takeovers" of rival parties.

Second, by barring late-blooming candidacies, the ban assures that candidates in all races have met valid requirements for holding office, have a modicum of support, and are able and willing to serve. Thus, for example, the ban on write-in votes enforces Hawaii's candidate age and residency requirements and other limits such as the state "resign-to-run" law. See *Fasi v. Cayetano*, 752 F. Supp. 942 (D. Haw. 1990) (en banc). At the same time, the Hawaii ban effects important procedural goals by guaranteeing a minimum period for scrutinizing the candidates, and allowing the State, before the election, to prevent "a situation where, after a candidate is elected, he is found not to possess the qualifications [for office]." *Hayes v. Gill*, 52 Haw. 251, 254, 472 P.2d 872, 875 (1970). And, since Hawaii law guarantees primary ballot placement to candidates who can produce only twenty-five signatures, the

only difference between Hawaii and the seventeen States which similarly ban write-in votes under specific circumstances is that, in Hawaii, any non-frivolous write-in candidate receives not just a write-in option, but a full blown opportunity to wage a ballot campaign.

Third, the ban on write-ins gives finality to races where there is a runaway primary winner. In county and state legislative races, a primary winner who faces no further ballot opposition is seated. See HRS § 12-41 and Haw. Const. art. III, § 4 (1989 Supp.). In other races, the seat is not filled, but the winner or her party retain important powers under state law. See HRS §§ 11-117, 11-118, 17-3, 17-4, 17-5. The write-in ban assures that the primary mandate is carried out, see *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 4-5 & n.4 (1982), once those who might defeat the runaway winner have had their chance.

B. The Proceedings Below.

Petitioner filed the first of the two actions below on August 21, 1986, to force Hawaii "to permit the casting and counting of write-in votes[.]" Complaint at 4, 5, C.R. 1 (No. 86-0582). The ostensible reason for the suit was the filing by only one candidate at the primary for state representative in the 19th District. Burdick alleged he wanted to vote in that race, "in both the primary and general elections, for a person who has not filed nominating papers and whose name will not be printed on the ballot." *Id.* at 3. He also stated an interest "in vot[ing] for other persons in other elections" "whose names are not, or may not be on the election ballot." *Id.* The District Court, overruling all the interests asserted by Hawaii, entered summary judgment and injunctive relief (see Pet.

App. at 66-77), relying mainly on the 1985 California Supreme Court's unreviewable federal dicta in *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985), reasoning that the write-in ban (like every law authorizing votes to be ignored) "may prevent a candidate preferred by a majority of voters from winning election" and bars individual voters "from casting ballots for their preferred candidates." See Pet. App. 71-72. The court of appeals entered a stay, and, in 1988, vacated and remanded with instructions to abstain under the *Pullman* doctrine. See *Burdick v. Takushi*, 846 F.2d 547 (9th Cir. 1988).

On remand, the District Court certified questions to the Hawaii Supreme Court, including whether "the Constitution of the State of Hawaii require[s] Hawaii's election officials to permit the casting of write-in votes." See Pet. App. 56-60. Although Respondents had not urged abstention in the court of appeals on the basis that the textually parallel provisions of the Hawaii Constitution were appropriate sources of relief under State law, and any such urging would have been legally inappropriate under such decisions as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n.4 (1984), Petitioner, without filing a reservation under (or even citing to) *England v. Medical Examiners*, 375 U.S. 411 (1964), presented the same arguments raised in the District Court in support of claims under Haw. Const. art. I, § 4, which Petitioner claimed "tracks almost exactly the language of the Fourteenth Amendment," Exh. "S" to C.R. 47 at 17, No. 86-0582, and Haw. Const. art. I, § 5, which Petitioner claimed "tracks almost exactly the language of the Fourteenth Amendment." *Id.* Petitioner claimed this Court has "adopt[ed] the principle that write-in voting is fundamental" and

"has spoken on the importance of casting and counting write-in votes"; and that the state court should "take note of the construction of those parts of the Federal Constitution . . . which are virtually identical to sections of the Hawaii Constitution" (*id.* at 18, 20-21).

The state court rejected these arguments on the merits, adopting the central language from this Court's ruling in *Munro v. Socialist Workers' Party*, 479 U.S. 189 (1986):

Hawaii's election laws provide for easy access to the ballot by new, or minority, parties, and by nonpartisan candidates. However, they do require that the nomination process be followed, and they do attempt to make the process of casting and counting ballots an orderly one, where the opportunities for fraud are minimized.

Burdick v. Takushi, 70 Haw. 498, 499-500, 776 P.2d 824, 826 (1989), Pet. App. 54-55.

On May 10, 1990, the District Court nonetheless held that the Hawaii election code was unconstitutional on its face as the ban on write-in voting "impermissibly infringes on plaintiff's federal constitutional rights" and "no compelling state interests exist to justify this intrusion." *Burdick v. Takushi*, 737 F. Supp. 582, 592 (D. Haw. 1990), Pet. App. 50. Despite the avenues Hawaii law provided, the District Court found that Hawaii law imposed burdens that were "great," and "enormous." *Id.* at 588, 593, Pet. App. 41, 51. The District Court broadly condemned Hawaii's primary rules as "striking at the heart of our democratic processes," permitting the State to "substitute its judgment as to what the voters want for the voters' own judgment." *Id.* at 589, Pet. App. 44. The District Court found that, in its opinion, the ban "stifles

what may be serious, legitimate candidacy," and, invoking a freewheeling reference to " 'the principle that debate on public issues should be uninhibited, robust, and wide open,' " nullified the ban even as to races where candidates would be seated after the primary, reasoning that "it is worth the extra time and money for the electorate to be exposed to increased debate and public discussion." *Id.* at 591, Pet. App. 47-48.

On March 1, 1991, the Ninth Circuit, on Respondents' timely appeals, unanimously reversed. Reaching the merits of Petitioner's claims over Respondents' objections that those claims had been forfeited by their full presentation to the Hawaii Supreme Court, the panel reasoned that while the right to vote was "fundamental," the "asserted right to vote for *any* candidate [one] chooses does not implicate fundamental constitutional protections." *Burdick v. Takushi*, 927 F.2d 469, 474 (9th Cir. 1991), Pet. App. 26 (original emphasis). The panel observed that Hawaii "provide[s] candidates with considerable ease of access to the ballot," and the ban "is not based on the content or subject matter of a write-in vote." *Id.* The court found the interests in fighting party raiding and sore loser candidacies, in promoting informed voting, and in effecting the primary mandate, justified the ban's burdens on "rights of expression and association." *Id.* at 475, Pet. App. 28.¹¹

¹¹ While we urged there was no need, given distinct burdens placed on Maryland voters by that state's ballot access laws, to disagree with *Dixon v. Maryland State Administrative Board*, 878 F.2d 776 (4th Cir. 1989), the panel disagreed with, instead of distinguishing, *Dixon*. 927 F.2d at 475, Pet. App. 28-30.

On March 15, 1991, Petitioner mailed a petition for panel rehearing, believing, erroneously, that mailing sufficed under FRAP 25(a). After the deadline, Petitioner sought and obtained an order extending the time to file the petition. On June 28, 1991, the panel denied rehearing, withdrew its earlier opinion, and directed that a new opinion be filed which did not alter the result in any respect, but which made clear that the panel had construed this Court's decisions broadly, and Petitioner's claims still failed.¹² Petitioner did not seek an extension of time to file the Petition for certiorari in this Court.

REASONS FOR DENYING THE WRIT

Contrary to the rather broad rhetoric adopted by the Petition, the Ninth Circuit's judgment in this case does not come close to authorizing the States to adopt "the electoral scheme that once prevailed in the Soviet Union" (Pet. 10 n.5), and, in fact, plainly complies with the important, but properly limited, principles this Court has adopted in its regulation of State election schemes under the federal Constitution. While the Petition undoubtedly presents interesting "conceptual questions" (Pet. at 20) of more than academic interest, and affirmance below would plainly have warranted a writ, there is no basis for review here, and the Petition should be denied.

¹² See *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991), Pet. App. 10 (deleting language to effect that Constitution "simply guarantee[s] an equal voice in the election of those who govern" (see 927 F.2d at 473) and resting decision on Burdick's claimed "unlimited right to vote for any particular candidate" in context of Hawaii's election scheme).

The short answer to the Petition is that the Ninth Circuit's reversal properly restored the balance expressed in this Court's decisions authorizing federal judicial restructuring of state election codes only where state laws, "in the context of [the state's] system [,]" *Anderson v. Celebrezze*, 460 U.S. 780, 803 (1983), make it "virtually impossible" for dissident votes to be counted, *Williams v. Rhodes*, 393 U.S. 23, 34 (1968), and thus "freeze the status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). Having never established – or, indeed, even tried to establish – below that these predicates for federal interference are presented by Hawaii's electoral system, which plainly affords "easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign," *Munro v. Socialist Workers' Party*, 479 U.S. 189, 199 (1986), Petitioner now seeks the reinstatement of the district court's unprecedented injunction mandating write-in votes at all Hawaii elections without limit. Neither logic, precedent, nor history support review in order to examine this prayer.

Nor is there any true conflict, much less one meriting review, between the judgment below and those of sister courts of appeals or the highest courts of sister States. While the Petition invokes the Ninth Circuit's rejection of the rhetoric in *Dixon v. Maryland State Administrative Board*, 878 F.2d 776 (4th Cir. 1989), *Dixon* is easily harmonized with the result below in light of the relative necessity for write-in voting under Maryland's electoral system, see *Jackson v. Norris*, 195 A. 576, 586 (Md. 1937), as well as *Dixon's* own limits on the supposed "right to write-in." Moreover, any perceived conflict with *Dixon* hardly demonstrates a sufficient division amongst the lower appellate courts, virtually all of whom, as to the

federal issues here, side with Respondents. See, e.g., *McClain v. Meier*, 851 F.2d 1045 (8th Cir. 1988); *Rainbow Coalition v. Election Bd.*, 844 F.2d 740 (10th Cir. 1988); *Hall v. Simcox*, 766 F.2d 1171 (7th Cir.), cert. denied, 474 U.S. 1006 (1985); *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d 605, 545 N.Y.S. 2d 686 (1989); cf. *Legislature of California v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991) (citing case below). The courts with jurisdiction over Hawaii have on five separate occasions upheld the write-in ban, and a substantial federal question can be conjured out of the ruling below only by ignoring the highly circumscribed instances in which federally-mandated write-in voting was ordered as a remedy to otherwise illegal election schemes. E.g., *Socialist Labor Party v. Rhodes*, 290 F. Supp. 893 (S.D. Ohio), aff'd, 393 U.S. 23 (1968); *Sullivan v. Grasso*, 292 F. Supp. 411 (D. Conn. 1968).

Finally, although the Petition fails of its own terms, there are at least two procedural obstacles to review: (1) the jurisdictional cloud hanging over the timeliness of the petition; and (2) Petitioner's failure properly to reserve the federal issue presented below given his unfettered argument of the merits of his federal claim in an effort to obtain a favorable ruling from the state courts under Hawaii's own Bill of Rights.

A. The Ninth Circuit's Reversal of the District Court's Unprecedented Injunction Plainly Comports with This Court's Rulings Circumscribing Review of State Electoral Frameworks.

The heart of the Petitioner's request for *certiorari* is the argument that "the Ninth Circuit entirely misconceived and misapplied" (Pet. 17) *Anderson v. Celebrezze*,

460 U.S. 780 (1983), in sustaining Hawaii's write-in ban, first by "adopting a narrow view of the constitutional interests implicated in the exercise of the franchise" (Pet. 10), and, second, "by casually accepting the state's proffered justification[s]" for the write-in ban (Pet. 17). These arguments are wrong.

First, as an initial matter, Petitioner does not even show how he has standing to invoke *Anderson*. While the Ninth Circuit held that the purely jurisdictional "injury-in-fact" component of standing was present, neither lower court, nor Petitioner, have ever shown how Mr. Burdick met the prudential component of standing, which requires "that a plaintiff's complaint fall within the zone of interests protected by the law invoked." See *Allen v. Wright*, 468 U.S. 737, 751 (1984). As the Petition virtually confesses, Petitioner has never identified any particular write-in candidate (even a fictitious one) he wishes to support, and has failed to bring his claims within the protected "zone" defined by this Court's election cases, namely, claims by supporters of specific "minor party or independent candidate[s]" who claim they are "frozen" out of the process. As the Eighth Circuit ruled recently, Mr. Burdick has never explained "why he is the only effective advocate of the voters' rights." *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990). Here where a voter brings suit without specifying any candidate at all that that voter would support, standing is plainly lacking. As in *Lujan v. National Wildlife Foundation*, 110 S. Ct. 3177 (1990), Mr. Burdick may not sustain his standing with "conclusory allegations of an affidavit." *Id.* at 3188. His allegations that he "most likely" will want to vote for "someone" in future Hawaii elections on a write-in basis ought not to have been credited.

Even if Petitioner has standing, however, his failure to identify any candidate (or candidate group) he supports renders this case a facial challenge in its purest form, requiring the Petition to show there are "no circumstances in which the [ban] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); accord *Stevenson v. State Board*, 794 F.2d 1176, 1181 (7th Cir. 1986) (Easterbrook, J., concurring); see also *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). This the Petition cannot, and, indeed, does not even seek to, do. The essence of the Petition's suggestion of error below, in an apparent flight from the main theory on which Petitioner litigated his case for five years,¹³ is not that the write-in ban is unconstitutional in all circumstances, but that, in combination with particular facets of the election code under particular fact situations, the burdens imposed by Hawaii law are impermissible. Pet. at 17-23 (ban "sweeps too broadly").

While this claim is itself wrong, the initial point here is that Plaintiff, by virtually conceding that Hawaii can ban sore-loser write-in candidacies (as Plaintiff defines them), or ban write-ins at the primary, has left this Court with nothing to decide. For, by failing to specify precisely when and how and for what class of candidates he seeks to cast write-in votes, Mr. Burdick has only a purely

¹³ Indeed, despite Petitioner's heavy emphasis on Hawaii's April filing deadline for new-party petitions (see Pet. at 22), Petitioner made no argument over the filing deadline whatever in the District Court, which plainly prohibits his raising the issue now. Cf. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 278-79 (1977) (on failure to raise issues below).

facial, and plainly meritless, challenge to all limits on write-in voting whatsoever.

Even if this were not so, it cannot be said that "the Ninth Circuit seriously misapplied the *Anderson* model" (Pet. 19). At the outset, it is dubious that *Anderson's* balancing approach is even applicable to a ballot-access case such as this one. Here, as Hawaii grants minor party and independent candidates "easy access to the primary election ballot and the opportunity" "to wage a ballot-connected campaign," *Munro*, 479 U.S. at 199, that fact makes Hawaii law, per se, "more accommodating of First Amendment rights and values," in that "access to a state-wide ballot" is "guarantee[d]." *Id.* at 198-99. Thus, this case is controlled by *Munro*. Review should be denied for this reason.

Even on the most exacting level of scrutiny, however, Hawaii's laws pass muster. First, the Petition's argument that "the right to vote and to participate meaningfully in the electoral process extends well beyond the act of choosing among the candidates whose names appear on the ballot" (Pet. 12) simply begs the question as far as the burden of the write-in ban is concerned. This Court has never viewed exercise of the right to vote as a spectator sport in which participants can complain whenever their preferences do not appear on the ballot. Indeed, this Court has held that in Texas, where write-in ballots are severely constrained, a First Amendment challenge to a 500 signature requirement, *twenty times* Hawaii's most burdensome signature requirement, "approache[d] the frivolous." *American Party of Texas v. White*, 415 U.S. 767, 789 (1974). In fact, this Court has made clear that, given " 'the realities of the electoral process.' " a ban on write-in voting is of little moment, as the viability of write-in

candidacies is "dubious at best." *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974); see also *Anderson*, 460 U.S. at 799 n.26. Indeed in *Munro*, this Court, in upholding Washington's blanket primary scheme, took no issue with the Ninth Circuit's view of Washington law as banning write-in votes for candidates eliminated at the primary. Compare *Socialist Workers Party v. Munro*, 765 F.2d 1417, 1419 (9th Cir. 1985). Other election schemes have passed muster here despite full or partial bans on write-in voting. Compare *Clements v. Fashing*, 457 U.S. 957 (1982), with *Fasi v. Cayetano*, 752 F. Supp. at 950 n.4 (noting how, under Texas law, write-in votes for the candidates in *Clements* are impossible).

Indeed, the manner in which the Petition exaggerates the burden imposed by the write-in ban can be best seen by this Court's decisions which approve judicially-ordered write-in voting solely as a remedy for laws that otherwise "freeze the political status quo." *Jenness, supra*, 403 U.S. at 438.

Thus, in *Socialist Labor Party v. Rhodes*, 290 F. Supp. 893 (S.D. Ohio), *aff'd*, 393 U.S. 23 (1968), the three judge court's remedy of write-in voting was entered to correct an egregiously burdensome election scheme, which required, for new parties, the filing of signatures *fifteen times* as many as, and three *months* earlier than, Hawaii demands, and, which together with "substantial additional burdens" made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties." *Id.* at 25. Based on these facts, this Court affirmed "relief to the extent of having the right, despite Ohio laws, to get the advantage of write-in ballots." *Id.* at 34. As one judge in *Rhodes* reasoned:

[T]he limited participation of minority parties in the past, and the lack of any showing of an administrative burden or necessity is a clear indication that the denial of the right to write in the name of the candidate of one's choice, *when coupled with the effective denial of ballot position*, amounts to an intentional denial of the plaintiffs' constitutionally protected right to vote.

290 F. Supp. at 997 (concurring op.) (emph. added); see *Sullivan v. Grasso*, 292 F. Supp. 411, 412 (D. Conn. 1968) (same).

Hawaii law, by contrast, provides "easy access" to groups seeking to form new political parties. "Easy access" is also given independents at the primary, the main point for constitutional purposes. Hawaii has no early candidate filing deadline. Non-presidential candidates need file no earlier than the third week in July, while presidential candidates have until September. The non-partisan route is hardly "insurmountable" (Pet. at 21), for under the least favored party rule (*see supra* pp. 9-10), more than a third of non-partisans advance to the November ballot. Petitioner's factual argument to the contrary (Pet. at 21), is simply wrong. And, given the plethora of parties which have filed under the new party provisions, and the likelihood that more parties will attain established party status under the 1986 amendments, arguments over the viability of that independent avenue are similarly without foundation.

Petitioner's denigration of Hawaii's interests in the write-in ban is similarly misplaced. Petitioner complains that "there is no evidence in the record of any serious effort by 'sore losers' to mount a write-in campaign" (Pet. 18), but this Court has held that States do not need to sustain any particular degree of injury "as a predicate to

the imposition of reasonable ballot access restrictions," *Munro*, 479 U.S. at 195, and may employ "effectual means" to combat sore loser candidacies. See *Storer*, 415 U.S. at 736. Here, that is all Hawaii has done. As Judge Easterbrook noted in *Stevenson v. State Board*, 794 F.2d 1176 (7th Cir. 1986), those "whose juices are riled by the results of the primary" are not "entitled to enough time after the primary election to get on the ballot as an independent." *Id.* at 1177. The ban on write-ins properly precludes not only those who ran and lost, but those who "did not run in a primary election but [were] dismayed by the result." *Id.* at 1178. Even under "narrow tailoring," see *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), this is all the law requires. The Petition has no answer on this front, nor can Petitioner advance any serious argument that a complete default at the primary stage by all those who would seek to unseat a candidate can be the basis for a federal injunction.

Indeed, the Petition also presents no serious issue that banning write-ins at the primary stage is an appropriate means for protecting party interests in open primary States. Even the Fourth Circuit in *Dixon* had no quarrel with Maryland's total ban on primary write-ins. See *Calvert, supra*, 272 Md. 659, 327 A.2d 290 (1974), *cert. denied*, 419 U.S. 1110 (1975).

That the interests in defeating party raiding and sore loser candidacies (or in promoting the primary mandate)¹⁴ may be each insufficient to support the entire ban

¹⁴ The Petition wrongly claims the primary protection argument does not apply in "the vast majority of electoral contests." Pet. at 19. In fact, the only races in which a runaway primary winner is not seated are the governorship, Members of Congress, and the board of education. See HRS § 12-41.

(Pet. 17-18), makes no difference if, together, they do. Moreover, the Petition has no good answer to Hawaii's interest in education and striking ineligible candidates. See *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (ballot is "not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate"). The late July candidate deadline has no serious constitutional flaw, a point that is underscored by the fact that electoral competition may just as likely be hindered by late deadlines which magnify the risk to early-starting candidates as by deadlines that are too prompt. As the court below observed, this case has nothing to do with content-based regulation of political speech, as opposed to voting, and therefore, the strict scrutiny which is admittedly necessary to the Petition's success (*cf. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), cited at Pet. 19), is wholly inapt to the actions here. There is no conflict between the judgment below and the rulings and principles underlying this Court's First Amendment jurisprudence. The asserted right to vote for Mickey Mouse (or any other write-in candidate) presents no issue of importance, and review should thus be denied.

B. There is No True Conflict Among the Lower Appellate Courts, and any Perceived Conflict is Not Sufficient to Warrant the Expenditure of the Court's Scarce Resources.

Despite the foregoing, Petitioner nonetheless urges the Court to grant review based on the perceived conflict between the decision below and *Dixon v. Maryland State Administrative Board*, 878 F.2d 776 (4th Cir. 1989). For numerous reasons, however, this perceived conflict does not merit review.

First, although there is undoubtedly much in the Fourth Circuit's opinion with which we and the Ninth Circuit disagree, *Dixon's* seemingly stringent treatment of Maryland's limits on write-in voting appears to be the result of unique burdens imposed by Maryland's general routes to the ballot, which require pledges of hundreds of voters, even for the most minor races, "that they intend to vote for the person so nominated," and which require "costly, precarious, and laborious efforts." *Jackson v. Norris*, 195 A. 576, 586 (Md. 1937), cited, *Dixon*, 878 F.2d at 783 n.11 & 785 n.13. *Dixon's* result is therefore perhaps best explainable by the relative need for write-ins in Maryland, and hence, there is no true conflict at all here.

Moreover, *Dixon's* focus was on Maryland's exaction of a filing fee for write-in candidacies, an issue that is collateral to the justifications for our regulation here. Indeed, as to those facets of Hawaii law of which petitioner truly complains, i.e., filing deadlines in general, *Dixon* squarely supports Respondents and the judgment below. As the Fourth Circuit agrees, voters must "have time to study the candidates to gauge their seriousness prior to the actual balloting," 878 F.2d at 784, and hence *Dixon* does not affect Maryland's requirement that write-in candidates file declarations within a week of a candidate's expenditure of \$51. Md. Elec. Code Ann. § 4D-1 (Supp. 1989). *Dixon's* condemnation of a filing fee on top of this potentially early filing deadline, even if correct, has no import for Hawaii law, particularly since Hawaii has a fixed, relatively late candidate deadline (July 24 in 1990), and, upon a trivial showing of support, will grant timely candidates the more powerful device of a "ballot

connected campaign." *Munro*, 479 U.S. at 199. For these reasons as well there is no conflict.¹⁵

Even if this Court were to perceive a conflict between the judgment below and *Dixon*, however, the single panel decision in *Dixon* does not justify review for added important reasons.

First, the result in *Dixon*, although not in conflict with the decision below, would appear to be so obviously wrong, particularly in light of fee-waiver provisions of Maryland law, cf. *Lubin v. Panish*, 415 U.S. 709 (1974), that the more prudent result would be to allow the Fourth Circuit to correct it by an en banc review rather than deploy *certiorari* in a case from another Circuit (i.e., this case) for that purpose.

Second, although a contrary judgment in the court of appeals in this case plainly would have raised important issues, Mr. Burdick's prayer for complete elimination of any regulation of write-in voting is not one that appears important to Hawaii voters as a whole. Although several losing litigants in other Hawaii voting cases have appeared on the Petition as amici, not one other voter joined or sought to join (or even sought to file as amicus curiae) in support of Mr. Burdick during the five previous years this litigation was pending in the courts below.

Third, however one interprets *Dixon's* rhetoric, this is not an issue on which the lower appellate courts are closely divided. Indeed, the great weight of opinion is

¹⁵ *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rept. 468 (1985), which was decided on state constitutional grounds, and therefore unreviewable by this Court, is also best understood as involving a five-month-before-election candidate-filing rule, a far cry from our late July candidate deadline.

with the Ninth Circuit as to the principles underlying the issue in this case. Thus, the Seventh Circuit upheld Indiana's ban on write-in votes despite the fact that Indiana's new party petition signature requirements are double those of Hawaii. *Hall v. Simconx*, 766 F.2d 1171, 1175 (7th Cir.), cert. denied, 474 U.S. 1006 (1985)¹⁶ Other circuits, which *Dixon* did not address, are in accord. See *Rainbow Coalition v. Oklahoma State Elections Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988) ("we do not think that the lack of write-in votes is, as a practical matter, a significant distinction"); *McClain v. Meier*, 851 F.2d 1045 (8th Cir. 1988) (holding jurisdictionally insubstantial Nebraska's refusal "to count write-in votes"); see also *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989); *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d 605, 545 N.Y.S.2d 686 (1989). Even courts which have ruled as a matter of state constitutional law that write-in voting is required are rethinking the validity of those holdings. See *Legislature of California v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991) (citing case below and *Canaan*, supra).

For all these added reasons, review should be denied.

C. Procedural Obstacles Cloud the Petition and Independently Warrant Denial of the Writ.

At least two added issues warrant denial of review.

¹⁶ For reasons that are unknown, the Indiana Attorney General did not appeal from the decision in *Paul v. Indiana Election Bd.*, 743 F. Supp. 616 (S.D. Ind. 1990), which was in direct conflict with the Seventh Circuit's decision in *Hall*. We submit that defaults by the Attorneys General of Indiana and of Kansas, see *Grogan v. Graves*, No 90-2378-0 (D. Kan. Oct. 30, 1990), are no basis for the granting of a writ of certiorari.

First, there is some doubt that the Petition is timely. Under this Court's Rules, the time for seeking review is tolled when "a petition for rehearing is timely filed in the lower court." Rule 13.4. Whether a court of appeals may unilaterally extend the time for review here by entering an order, based on a motion to extend time filed after the FRAP 40 deadline has passed is an open issue, particularly when the filing error in this case is apparent from the Rules. Indeed, as the petition was not granted, no oral hearing was held on it, cf. *Bowman v. Loperena*, 311 U.S. 262, 266 (1941), and no "matters of substance" were changed in the underlying judgment, see *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952), this Court's prior precedents suggest the time to petition here was not tolled. Petitioner, it should be noted, could have avoided this issue by obtaining an extension of time in this Court.

Second, and perhaps more important, Petitioner's claims cannot be reached in light of the failure to comply below with *England v. Medical Examiners*, 375 U.S. 411 (1964). Petitioner plainly submitted arguments to the state court that went beyond those called for by the abstention doctrine, and which called upon the Hawaii Supreme Court to resolve the identical constitutional issues here under the Hawaii analogues to the First Amendment and Due Process Clauses. In contrast to the procedure prescribed by *England*, Petitioner did not just raise arguments addressed to the textually distinct provisions of Hawaii law "in light of" his federal claims, as required by *Government Employees v. Windsor*, 353 U.S. 364 (1955), but in fact urged that relief be granted on the basis of state laws that "track almost exactly" the federal Constitution. Having done "more than is required by *Windsor*," it was Plaintiff's burden to make an "explicit

reservation" in the state courts "that he is exposing his federal [arguments] there only for the purpose of complying with *Windsor*." 375 U.S. at 419, 421. Petitioner wrongly seeks to "split a cause of action between federal and state courts where abstention is inappropriate." *Wicker v. Board of Education*, 826 F.2d 442, 446 (6th Cir. 1987). Since the Hawaii court's constitutional ruling, based on its view that Hawaii grants "easy access to the ballot," would, absent *England* concerns, be preclusive under 28 U.S.C. § 1738, see *Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965-66 (1982), the question presented ought not be reviewed for reasons wholly independent of the merits of the decision below.

CONCLUSION

For the reasons above, the writ should be denied or dismissed, or the judgment of the Ninth Circuit should be affirmed.

Dated: Honolulu, Hawaii, November 15, 1991.

Respectfully submitted,

WARREN PRICE, III*

Attorney General

State of Hawaii

*Counsel of Record

STEVEN S. MICHAELS

Deputy Attorney General

State of Hawaii

425 Queen Street

Honolulu, Hawaii 96813

(808) 586-1500

Counsel for Respondents

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	Nos. 90-15873,
Plaintiff-Appellee,	)	90-15876
)	
v.)	
MORRIS TAKUSHI, Director of)	
Elections, State of Hawaii; JOHN	)	D.C. No.
WAIHEE, Lieutenant Governor of	)	CV-86-0582-HMF
Hawaii; BENJAMIN CAYETANO,)	
in his capacity as Lieutenant)	
Governor of the State of Hawaii;)	
Defendants-Appellants.)	
<hr/>		
ALAN B. BURDICK,	)	No. 90-15877
Plaintiff-Appellee,)	
	)	D.C. No.
- v.	)	CV-88-0365-HMF
BENJAMIN CAYETANO, in his)	
capacity as Lieutenant Governor	)	ORDER
of the State of Hawaii; MORRIS	)	(Filed Apr. 15,
TAKUSHI, Director of Elections	)	1991)
of the State of Hawaii,)	
Defendants-Appellants,)	
<hr/>		

Before: BEEZER, Circuit Judge

Appellee's motion for an extension of time to file a petition for rehearing en banc from 14 days to 21 days is GRANTED.

APPENDIX "B"

HAWAII REVISED STATUTES (1985) TOGETHER WITH PERTINENT AMENDMENTS, HISTORY AND CONSTITUTIONAL PROVISIONS

PART I GENERAL PROVISIONS

§11-1 Definitions. Whenever used in this title, the words and phrases in this title shall, unless the same is inconsistent with the context, be construed as follows:

"Ballot," a ballot including an absentee ballot is a written or printed, or partly written and partly printed paper or papers containing the names of persons to be voted for, the office to be filled, and the questions or issues to be voted on. A ballot may consist of one or more cards or pieces of paper depending on the number of offices, candidates to be elected thereto, questions or issues to be voted on, and the voting system in use. It shall also include the face of the mechanical voting machine when arranged with cardboard or other material within the ballot frames, containing the names of the candidates and questions to be voted on.

"Chief election officer," the lieutenant governor as set forth in section 11-2.

"Clerk," the county clerks of the respective counties.

"County," the counties of Hawaii, Maui, Kauai, and the city and county of Honolulu, as the context may require. For the purposes of this title, the county of Kalawao shall be deemed to be included in the county of Maui.

"Election," all elections, primary, special primary, general, special general, special, or county, unless otherwise specifically stated.

"Election officials," precinct officials and other persons designated as officials by the chief election officer.

"Hawaiian," any descendant of the aboriginal peoples inhabiting the Hawaiian Island which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Office," an elective public office.

"Political party" or "party," a political party qualified under part V of this chapter.

"Precinct," the smallest political subdivision established by law.

"Primary," a preliminary election in which the voters nominate candidates for office as provided for in chapter 12.

"Special election," any single election required by law when not preceded by an election to nominate those candidates whose names appear on the special election ballot.

"Special primary election" and "special general election," elections held only (a) whenever any vacancy occurs in the offices of United States senator, United States representative, state senator, or state representative because of failure to elect a person at an uncontested general election or (b) as specified in county charters.

"Voter," any person duly registered to vote.

"Voting system," the use of paper ballots, electronic ballot cards, voting machines, or any system by which votes are cast and counted. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(a); am L 1979, c 196, §3; am L 1980, c 264, §1(a)]

§11-2 Chief election officer. (a) The lieutenant governor shall be the chief election officer for the administration of this title. The lieutenant governor shall supervise all state elections. The chief election officer may delegate responsibilities in state elections within a county to the clerk of that county or to other specified persons.

(b) The chief election officer shall be responsible for the maximization of registration of eligible electors throughout the State. In maximizing registration the chief election officer shall make an effort to equalize registration between districts, with particular effort in those districts in which the chief election officer determines registration is lower than desirable. The chief election officer in carrying out this function may make surveys, carry on house to house canvassing, and assist or direct the clerk in any other area of registration.

(c) The chief election officer shall maintain data concerning registered voters, elections, apportionment, and districting. The chief election officer shall use this data to assist the reapportionment commission provided for under Article IV of the Constitution. [L 1970, c 26, pt of §2; am L 1979, c 51, §5; am imp L 1984, c 90, §1]

§11-3 Application of chapter. This chapter shall apply to all elections, primary, special primary, general,

special general, special, or county, held in the State, under all voting systems used within the State, so far as applicable and not inconsistent herewith. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(b)]

§11-4 Rules and regulations. The chief election officer may make, amend, and repeal such rules and regulations governing elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar matters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.

In making, amending, and repealing rules and regulations for voters who cannot vote at the polls in person and all other voters, the chief election officer shall provide for voting by such persons in such manner as to insure secrecy of the ballot and to preclude tampering with the ballots of those voters and other election frauds. Such rules and regulations, when adopted in conformity with chapter 91 and upon approval by the governor, shall have the force and effect of law. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§11-5 Employees. The chief election officer may employ a permanent staff, subject to the provisions of chapters 76 and 77, to supervise state elections; maximize registration of eligible voters throughout the State; maintain data concerning registered voters, elections, apportionment, and districting; and to perform other duties as prescribed by law. The chief election officer or county clerk may employ precinct officials and other election employees as the chief election officer or county clerk

may find necessary, none of whom shall be subject to the provisions of chapters 76 and 77. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(c); am L 1977, c 199, §2; am imp L 1984, c 90, §1]

* * *

PART V. PARTIES*

§11-61 "Political party" defined. (a) The term "political party" shall mean any party which was on the ballot at the last general election which has not been disqualified by this section and any political group which shall hereafter undertake to form a political party in the manner provided for in sections 11-62 to 11-64. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements shall be subject to disqualification:

- (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraphs (2) to (5) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term;

* See 1986 amendments, *infra* pp. 63-66.

- (2) The party received at least ten per cent of all votes cast for any of the offices voted upon by all the voters in the State;
- (3) The party received at least ten per cent of all the votes cast in at least fifty per cent of the congressional districts;
- (4) The party received at least ten per cent of all the votes cast in at least the six senatorial districts with the lowest votes cast for the office of state senator; or
- (5) The party received at least ten per cent of all the votes cast in at least fifty per cent of the representative districts for the office of state representative. [L 1970, c 26, pt of §2; am L 1979, c 125, §3(1); am L 1983, c 34, §3]

§11-62 Formation of new parties; petition. (a) Any group of persons hereafter desiring to form a new political party in the State shall file with the chief election officer a petition as hereinafter provided. The petition for the formation of a new political party shall:

- (1) Be filed not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary;
- (2) Declare as concisely as may be the intention of signers thereof to form such new statewide political party in the State and state the name of the new party;
- (3) Contain the signatures of currently registered voters comprising not less than one per cent of the total registered voters of the State as of the last preceding general election;

- (4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committee, where they exist, of the new political party and by the party rules; and
- (5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any political party. All objections shall be made not later than 4:30 p.m. on the tenth day after the petition has been filed. If no objections are raised by 4:30 p.m. on the tenth day, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the petition or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(p); am L 1983, c 34, §4]

§11-63 Party rules, amendments to be filed. All existing parties must file their rules with the chief election officer not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary. All amendments shall be filed with the chief election officer not later than 4:30 p.m. on the thirtieth day after their adoption. The rules and amendments shall be duly certified to by an authorized officer of the party and upon filing, the rules and amendments thereto shall be a public record. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(q); am L 1983, c 34, §5]

§11-64 Names of party officers to be filed. All parties shall submit to the chief election officer and the respective county clerks not later than 4:30 p.m. on the ninetieth day prior to the next primary, a list of names and addresses of officers of the central committee and of the respective county committees. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(r); am L 1983, c 34, §6]

§11-65 Determination of party disqualification; notice of disqualification. Not later than 4:30 p.m. on the one hundred twentieth day after a general election, the chief election officer shall determine which parties were qualified to participate in the last general election, but which have become disqualified to participate in the forthcoming elections. Notice of intention to disqualify shall be served by certified or registered mail on the chairman of the state central committee or in the absence of the chairman, any officer of the central committee of the party, as shown by the records of the chief election officer. In addition, notice of intention to disqualify shall also be given by publication in a newspaper of general circulation.

If an officer of the party whose name is on file with the chief election officer desires a hearing on the notice of intention to disqualify, the officer of the party shall, not later than 4:30 p.m. on the tenth day after service by mail or not later than 4:30 p.m. on the tenth day after the last day upon which the notice is published in any county, whichever is later, file an affidavit with the chief election officer setting forth facts showing the reasons why the party should not be disqualified. The chief election officer shall call a hearing not later than twenty days following receipt of the affidavit. The chief election officer shall

notify by certified or registered mail the officer of the party who filed the affidavit of the date, time and place of the hearing. In addition, notice of the hearing shall be published in a newspaper of general circulation not later than five days prior to the day of the hearing. The chief election officer shall render the chief election officer's decision not later than 4:30 p.m. on the seventh day following the hearing. If the party does not file the affidavit within the time specified, the notice of intention to disqualify shall constitute final disqualification. A party thus disqualified shall have the right to requalify as a new party by following the procedures of section 11-62. [L 1970, c 26, pt of §2; am L 1973, c 217, §(5); am L 1977, c 189, §(4); am imp L 1984, c 90, §1]

* * *

PART VII. CONDUCT OF ELECTIONS

* * *

§11-91 Proclamation. Not later than 4:30 p.m. on the tenth day prior to the close of filing in elections involving state offices the chief election officer shall issue an election proclamation. In elections involving only county offices the clerk shall issue the proclamation. In elections involving both state and county offices the proclamation may be issued jointly.

The proclamation shall contain a statement of the time and places where, and the purposes for which, the election is to be held, and a designation of the offices and the terms thereof for which candidates are to be nominated or elected. It may also contain any other relevant matter including an offer of rewards for the detection and conviction of offenders against the election laws. The chief election officer or clerk shall cause the election

proclamation to be published at least once in a newspaper of general circulation and not later than on the tenth day prior the close of filing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(aa)]

§11-92 REPEALED. L 1983, c 34, §8.

§11-92.1 Election proclamation: establishment of a new precinct. (a) The chief election officer shall issue a proclamation whenever a new precinct is established in any representative district. The chief election officer shall provide a suitable polling place for each precinct. Schools, recreational halls, park facilities, and other publicly owned or controlled buildings shall, whenever possible and convenient, be used as polling places. The chief election officer shall make arrangements for the rental or erection of suitable shelter for this purpose whenever public buildings are not available and shall cause these polling places to be equipped with the necessary facilities for lighting, ventilation, and equipment needed for elections on any island. This proclamation may be issued jointly with the proclamation required in section 11-91.

(b) No change shall be made in the boundaries of any precinct later than 4:30 p.m. on the tenth day prior to the close of filing for an election. [L 1983, C 34, §9; am L 1984, c 39, §1]

§11-92.2 Multiple polling place sites. (a) The chief election officer may establish multiple polling place sites for contiguous precincts, notwithstanding district boundaries, when it is convenient and readily accessible for the voters of the precincts involved.

(b) No multiple polling place site shall be established later than 4:30 p.m. on the tenth day prior to the close of filing for an election. [L 1983, c 34, §10; am L 1984, c 39, §2]

§11-92.3 Consolidated precincts: natural disasters; special elections. (a) In the event of a flood, tsunami, earthquake, volcanic eruption, high wind, or other natural disaster occurring prior to an election which makes a precinct inaccessible, the chief election officer or county clerk in the case of county elections may consolidate precincts within a representative district. The chief election officer or county clerk in the case of county elections shall give notice of the consolidation in the affected county prior to the opening of the precinct polling places by whatever possible news or broadcast media. Precinct officials and workers affected by the consolidation shall not forfeit their pay.

(b) In the event the chief election officer or the county clerk in a county election determines that the number of candidates or issues on the ballot in a special, special primary, or special general election does not require the full number of established precincts, such precincts may be consolidated for the purposes of the special, special primary, or special general election into a small number of special, special primary, or special general election precincts. A special, special primary, or special general election precinct shall be considered the same as an established precinct for all purposes, including precinct official requirements provided in section 11-71. Not later than 4:30 p.m. on the tenth day prior to the special, special primary, or special general election the chief election officer or the county clerk shall give public

notice is a newspaper of general circulation in the area in which the special, special primary, or special general election is to be held of the special, special primary, or special general election precincts and their polling places. Notices of such consolidation shall also be posted on election day at the established precinct polling places giving the location of the special, special primary, or special general election precinct polling place. [L 1983, c 34, §11]

§11-93 Voting units. Immediately after the close of registration of voters preceding any election, the chief election officer shall establish one or more voting units in each precinct polling place. All voting units shall be in the same precinct polling place. In a precinct having more than one voting unit the chief election officer or the officer's authorized representative shall designate each unit by a uniform identification system. The clerk in preparing the list of registered voters shall divide the list, on an alphabetical basis, as equal as possible between or among the voting units. [L 1970, c 26, pt of §2; am L 1979, c 133, §3; am imp L 1984, c 90, §1]

§11-94 Exemptions of voters on election day. Every voter shall be privileged from arrest on election day while at the voter's polling place and in going to and returning therefrom, except in case of breach of the peace then committed, or in case of treason or felony. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§11-95 Employees entitled to leave on election day for voting. Any voter shall on the day of the election be entitled to be absent from any service or employment in which such voter is then engaged or employed for a

period of not more than two hours (excluding any lunch or rest periods) between the time of opening and closing the polls to allow two consecutive hours in which to vote. Such voter shall not because of such absence be liable to any penalty, nor shall there be any rescheduling of normal hours or any deduction made, on account of the absence from any usual salary or wages; provided that the foregoing shall not be applicable to any employee whose hours of employment are such that the employee has a period of two consecutive hours (excluding any lunch or rest periods) between the time of opening and closing the polls when the employee is not working for the employer. If, however, any employee fails to vote after taking time off for that purpose the employer, upon verification of that fact, may make appropriate deductions from the salary or wages of the employee for the period during which the employee is hereunder entitled to be absent from employment. Presentation of a voter's receipt by an employee to the employer shall constitute proof of voting by the employee. Any person violating this section shall be guilty of an offense under section 19-8. [L 1970, c 26, pt of §2; am L 1976, c 106, §1(7); am L 1981, c 100, §1(1)]

§11-96 Records prima facie evidence. Every record made pursuant to law by a board of registration of voters, or the precinct officials, shall be a prima facie evidence of the facts there in set forth, and shall be received as such in any court or tribunal in which the same is offered in evidence. [L 1970, c 26, pt of §2; am L 1973, c 217, § 1(cc)]

§11-97 Records open to inspection. The register of voters and all records appertaining to the registry of voters, or to any election, in the possession of the board

of registration, the precinct officials, the chief election officer, or the clerk shall, at all reasonable times, be open to the inspection of any voter with the following exception: the voted ballots and other sealed election materials shall not be open to the inspection of any voter until after the end of the contest period unless opened upon order of the court. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(dd); am L 1983, c 34, §12]

§11-98 Forms and materials used in elections. Books blanks, records, certificates, and other forms and materials required by this title shall be of uniform character suitable for the voting system in use and shall be prescribed by the chief election officer after consultation with the clerks involved. [L 1970, c 26, pt of §2]

§11-99 Members of Congress, applicability of election laws. The nomination and election of a senator or representative to Congress shall be in conformity to the laws applicable to the election of members of the state legislature except as expressly otherwise provided or where in conflict with federal law. [L 1970, c 26, pt of §2]

* * *

PART VIII. BALLOTS

§11-111 Officials and facsimile ballots. Ballots issued by the chief election officer in state elections and by the clerk in county elections are official ballots. In elections using the paper ballot and electronic voting systems, the chief election officer or clerk in the case of county elections shall have printed informational posters containing facsimile ballots which depict the official ballots to be used in the election. The precinct officials shall post the informational posters containing the facsimiles

of the official ballots near the entrance to the polling place where they may be easily seen by the voters prior to voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(cc); am L 1975, c 36, §1(4); am L 1980, c 264, §1(f)]

§11-112 Contents of ballot. (a) The ballot shall contain the names of the candidates, their party affiliation or nonpartisanship in partisan election contests, the offices for which they are running, and the district in which the election is being held. In multimember races the ballot shall state that the voter shall not vote for more than the number of seats available or the number of candidates listed where such number is less than the seats available.

(b) The ballot may include questions concerning proposed state constitutional amendments, proposed county charter amendments, or proposed initiative or referendum issues. When the legislature passes a bill to submit a proposed constitutional amendment to the electorate, the bill shall contain the exact question that is to be printed on the ballot. The question shall be phrased to require a "yes" or "no" response by the voter.

(c) At the chief election officer's discretion, the ballot may have a background design imprinted onto it.

(d) When the electronic voting system is used, the ballot may have pre-punched codes and printed information which identify the voting districts, precincts, and ballot sets to facilitate the electronic data processing of these ballots.

(e) The name of the candidate may be printed with the Hawaiian or English equivalent or nickname, if the

candidate so requests in writing at the time the candidate's nomination papers are filed. Candidates' names, including the Hawaiian or English equivalent or nickname, shall be set on one line.

(f) The ballot shall bear no word, motto, device, sign, or symbol other than allowed in this title. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(5); am L 1977, c 189, §1(7); am L 1980, c 264, §1(g); am L 1983, c 34, §13; am L 1984, c 62, §1]

§11-113 Presidential ballots. (a) In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party.

(b) A "national party" as used in this section shall mean a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party. If there is no national party or the national and state parties or factions in either the national or state party do not agree on the presidential and vice presidential candidates, the chief election officer may determine which candidates' names shall be placed on the ballot or may leave the candidates' names off the ballot completely.

(c) All candidates for president and vice president of the United States shall be qualified for inclusion on the general election ballot under either of the following procedures:

- (1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:
 - (A) The name and address of each of the two candidates;
 - (B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;
 - (C) A statement that the candidates are the duly chosen candidates of both the state and the national party, giving the time, place, and manner of the selection.
- (2) In the case of candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:
 - (A) A sworn application which shall include the information required under (1)(A) and (B) above, and (C) where applicable;
 - (B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered

voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

Prior to being issued the petition form, the person desiring to place the names on the general election ballot shall submit a notarized statement from each candidate of that person's intent to be a candidate for president or vice president of the United States on the general election ballot in the State of Hawaii.

(d) Each applicant, and the candidates named, shall be notified in writing of the applicant's or candidate's eligibility or disqualification for placement on the ballot not later than 4:30 p.m. on the tenth day after filing or not later than 4:30 p.m. on the fiftieth day prior to the presidential election, whichever is less.

(e) If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion

of the hearing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ff); am L 1977, c 189, §1(8); am L 1983, c 34, §14]

§11-114 Order of offices on ballot. The order of offices on a ballot shall be arranged substantially as follows: first, president and vice president of the United States; next, United States senators; next, United States house of representatives; next, governor and lieutenant governor; next, state senators; next, state representatives; and next, county offices. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(gg); am L 1980, c 264, §1(h)]

§11-115 Arrangement of names on the ballot. The names of the candidates shall be placed upon the ballot for their respective offices in alphabetical order except as provided in section 11-118 and the limitations of the voting system in use, and except for the case of the candidates for vice president and lieutenant governor in the general election whose names shall be placed immediately below the name of the candidate for president or governor of the same political party.

In elections using the paper ballot or electronic voting systems where the names of the candidates are printed and the voter records the voter's vote on the face of the ballot, the following format shall be used: A horizontal line shall be ruled between each candidate's name and the next name, except between the names of presidential and vice presidential candidates and candidates for governor and lieutenant governor of the same political party in the general election. In such case the horizontal line will follow the name of the candidates for vice president and lieutenant governor of the same political party, thereby grouping the candidates for president and

vice president and governor and lieutenant governor of the same political party within the same pair of horizontal lines. Immediately after all the names, on the right side of the ballot, two vertical lines shall be ruled, so that in conjunction with the horizontal lines, a box shall be formed opposite each name and its equivalent, if any. In case of the candidates for president and vice president and governor and lieutenant governor of the same political party, only one box shall be formed opposite their set of names. The boxes shall be of sufficient size to give ample room in which to designate the choice of the voter in the manner prescribed for the voting system in use. All of the names upon a ballot shall be placed at a uniform distance from the left edge and close thereto, and shall be of uniform size and print subject to section 11-119. [L 1970, c 26, pt of §2; am L 1973, c 217, §1 (hh); am L 1976, c 106, §1(8); am L 1977, c 189, §1(9); am imp L 1984, c 90, §1]

§11-116 Checking ballot form by candidates and parties. Facsimiles of all ballot layouts prior to printing shall be available for viewing by the candidates and the parties at the office of the chief election officer and the county clerk as soon after the close of filing as they are available. Such layout facsimilies [sic] shall show the type faces used, the spelling and placement of names, and other information on the ballot. [L 1970, c 26, pt of §2]

§11-117 Withdrawal of candidates; disqualification; death; notice. (a) Any candidate may withdraw not later than 4:30 p.m. on the day immediately following the close of filing for any reason and may withdraw after the close of filing up to 4:30 p.m. on the twentieth day prior to an

election for reasons of ill health. When a candidate withdraws for ill health, the candidate shall give notice in writing to the chief election officer if the candidate was seeking a congressional or state office, or the candidate shall give notice in writing to the county clerk if the candidate was seeking a county office. The notice shall be accompanied by a statement from a licensed physician indicating that such ill health may endanger the candidate's life.

(b) On receipt of the notice of withdrawal the chief election officer or the clerk shall inform the chairperson of the political party of which the person withdrawing was a candidate. When a candidate dies, withdraws, or is disqualified after the close of filing and the ballots have been printed, the chief election officer or the clerk shall either order the candidate's name stricken from the ballot or order that a notice of the disqualification, withdrawal, or death be prominently posted at the appropriate polling places on election day.

(c) In no case shall the filing fee be refunded after filing. [L 1970, c 26, pt of §2; am L 1972, c 77, §3; am L 1973, c 217, §1(n); am L 1983, c 34, §15]

§11-118 Vacancies; new candidates; insertion of names on ballots. In case of death, withdrawal, or disqualification of any party candidate after filing the vacancy so caused may be filled by the appropriate committee of the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification. If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m.

on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order. If no substitution is made, the candidacy involved shall be declared vacant. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(jj); am L 1980, c 247, §1; am L 1983, c 34, §16]

§11-119 Printing quantity. (a) The ballots shall be printed by order of the chief election officer or the clerk in the case of county elections. In any state or county election the chief election officer on agreement with the clerk may consolidate the printing contracts for similar types of ballots where such consolidation will result in lower costs.

(b) Whenever the chief election officer is responsible for the printing of ballots, the exact wording to appear thereon, including, but not limited to, questions and issues shall be submitted to the chief election officer not later than 4:30 p.m. on the sixtieth calendar day prior to the applicable election.

(c) Based upon clarity and available space, the chief election officer or the clerk in the case of county elections shall determine the style and size of type to be used in printing the ballots. The color, size, weight, shape, and thickness of the ballot shall be determined by the chief election officer.

(d) Each precinct shall receive a sufficient number of ballots based on the number of registered voters and

the expected spoilage in the election concerned. A sufficient number of absentee ballots shall be delivered to each clerk not later than 4:30 p.m. on the fifteenth day prior to the date of any election. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(kk); am L 1975, c 36, §1(6); am L 1976, c 106, §1(9); am L 1979, c 133, §4; am L 1980, c 264, §1(l); am L 1985, c 203, §4]

§11-120 Distribution of ballots; record. The chief election officer or the county clerk in county elections shall forward the official ballots, specimen ballots, and other materials to the precinct officials of the various precincts. They shall be delivered and kept in a secure fashion in accordance with rules and regulations promulgated by the chief election officer. In no case shall they arrive later than the opening of the polls on election day.

A record of the number of ballots sent to each precinct shall be kept by the chief election officer or the clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ll)]

* * *

PART IX. VOTING PROCEDURES

§11-131 Hours of voting. The polls shall be opened by the precinct officials at 7:00 a.m. of the election day and shall be kept open continuously until 6:00 p.m. of that day. If, at the closing hour of voting, any voter desiring to vote is standing in line outside the entrance of the polls with the desire of entering and voting, but due to the polling place being overcrowded has been unable to do so, the voter shall be allowed to vote irrespective of the closing hour of voting. No voter shall be permitted to enter or join the line after the prescribed hour for closing

the polls. If all of the registered voters of the precinct have cast their votes prior to the closing time, the polls may be closed earlier but the votes shall not be counted until after closing time unless allowed by the chief election officer. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(mm); am imp L 1984, c 90, §1]

§11-132 One thousand foot radius; admission within polling place. (a) The precinct officials shall post in a conspicuous place, prior to the opening of the polls, a map designating an area of one thousand feet in radius around the polling place. Any person who remains or loiters within an area of one thousand feet in radius around the polling place for the purpose of campaigning shall be guilty of a misdemeanor.

(b) Admission within the polling place shall be limited to the following:

- (1) Election officials;
- (2) Watchers, if any, pursuant to section 11-77;
- (3) Candidates;
- (4) Any voters actually engaged in voting, going to vote or returning from voting;
- (5) Any person, designated by a voter who is physically disabled, while the person is assisting the voter; and
- (6) Any person or nonvoter group authorized by the chief election officer or the clerk in county elections to observe the election at designated precincts for educational purposes provided that they conduct themselves so that they do not interfere with the election process. [L 1970, c 26, pt of §2; am

L 1973, c 217, §1(nn); am L 1975, c 36, §1(7); am L 1980, c 264, §1(j); am imp L 1984, c 90, §1]

§11-133 Voting booths; placement of visual aids. The precinct officials shall provide sufficient voting booths within the polling place at or in which the voters may conveniently cast their ballots. The booths shall be so arranged that in casting the ballots the voters are screened from the observation of others.

Visual aids shall be posted at or in each voting booth and in conspicuous places outside the polling places before the opening of the polls. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(oo); am L 1975, c 36, §1(7A); am L 1981, c 100, §1(2)]

§11-134 Ballot transport containers, ballot boxes. (a) The seals of the ballot transport containers shall be broken and opened on election day only in the presence of at least two precinct officials not of the same political party.

(b) The chief election officer shall provide suitable ballot boxes for each polling place needed. They shall have a hinged lid fastened securely by a nonreusable seal. In the center of the lid there shall be an aperture of the appropriate size for the voting system used. The ballot boxes shall be placed at a point convenient for the deposit of ballots and where they can be observed by the precinct officials.

(c) At the opening of the polls for election, the chairperson of the precinct officials shall publicly open the ballot boxes and expose them to all persons present to show that they are empty. The ballot boxes shall be closed and sealed; they shall remain sealed until transported to

the counting center; provided that, in precincts where the electronic voting system is used, the ballot boxes shall not be opened at the polling places except as provided by rules adopted pursuant to chapter 91. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(8); am L 1980, c 264, §1(k); am L 1983, c 34, §17]

§11-135 Early collection of ballots. In an electronic ballot system election the chief election officer may authorize collection of voted ballots before the closing of the polls in order to facilitate the counting of ballots; provided that the voted ballots shall be returned to the counting center in sealed ballot boxes. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(pp); am L 1975, c 36, §1(9); am L 1980, c 264, §1(l); am L 1983, c 34, §18]

§11-136 Poll book, identification, voting. Every person upon applying to vote shall sign the person's name in the poll book prepared for that purpose. This requirement may be waived by the chairman of the precinct officials if for reasons of illiteracy or blindness or other physical disability the voter is unable to write. Every person shall provide identification if so requested by a precinct official.

After signing the poll book and receiving the voter's ballot, the voter shall proceed to the voting booth to vote according to the voting system in use in the voter's precinct. The precinct official may, and upon request shall, explain to the voter the mode of voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(qq); am imp L 1984, c 90, §1]

§11-137 Secrecy; removal or exhibition of ballot. No person shall look at or ask to see the contents of the ballot

or the choice of party or nonpartisan ballot of any voter, except as provided in section 11-139, nor shall any person within the polling place attempt to influence a voter in regard to whom the voter shall vote for. When a voter is in the voting booth for the purpose of voting, no other person shall, except as provided in section 11-139, be allowed to enter the booth or to be in a position from which the person can observe how the voter votes.

No person shall take a ballot out of the polling place except as provided in sections 11-135 and 11-139. After voting the voter shall leave the voting booth and deliver the voter's ballot to the precinct official in charge of the ballot boxes. The precinct official shall make certain that the precinct official has received the correct ballot and no other and then shall deposit the ballot into the ballot box. No person shall look at or ask to see the contents of the unvoted ballots. If any person having received a ballot leaves the polling place without first delivering the ballot to the precinct official as provided above, or wilfully exhibits the person's ballot or the person's unvoted ballots in a special primary or primary election, except as provided in section 11-139, after the ballot has been marked, such person shall forfeit the person's right to vote, and the chairman of the precinct officials shall cause a record to be made of the proceeding. [L 1970, c 26, pt of §2; am L 1972, c 158, §1; am L 1973, c 217, §1(rr); am L 1975, c 36, §1(10); am L 1980, c 264, §1(m); am imp L 1984, c 90, §1]

§11-138 Time allowed voters. A voter shall be allowed to remain in the voting booth for five minutes, and having voted the voter shall at once emerge and leave the voting booth. If the voter refuses to leave when

so requested by a majority of precinct officials after the lapse of five minutes, the voter shall be removed by the precinct officials. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ss), am L 1980, c 264, §1(n); am imp L 1984, c 90, §1]

§11-139 Voting assistance. (a) Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or agent of the voter's union, or the voter may receive the assistance of two precinct officials who are not of the same political party. Before rendering assistance or permitting assistance to be rendered, the precinct officials shall be satisfied that the physical disability exists. If a voter with a physical disability finds it unduly burdensome to enter the polling place, the voter may be handed a ballot outside the polling place but within one hundred feet thereof by the precinct officials and in their presence but in a secret manner, mark and return the same to the precinct officials.

(b) The precinct officials shall enter in writing in the record book the following:

- (1) The voter's name;
- (2) The fact that the voter cannot read the names on the ballot, if that is the reason for requiring assistance, and otherwise, the specific physical disability which requires the voter to receive assistance; and
- (3) The name or names of the person or persons furnishing the assistance. [L 1970, c 26, pt of §2; am L 1972, c 158, §2; am L 1973, c 217, §1(tt); am L 1985, c 203, §5]

§11-140 Spoiled ballots. In elections using the paper ballot and electronic voting systems, if a voter spoils a ballot, the voter may obtain another upon returning the spoiled one. Before returning the spoiled ballot, the voter shall conform to the procedure promulgated by the chief election officer to retain the secrecy of the vote. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(uu); am L 1975, c 36, §1(ll); am L 1980, c 264, §1(o); am L 1981, c 100, §1(e)]

* * *

PART X. VOTE DISPOSITION

§11-151 Vote count. Each contest or question on a ballot shall be counted independently as follows:

- (1) If the votes cast in a contest or question are equal to or less than the number to be elected or chosen for that contest or question, the votes shall be counted.
- (2) If the votes cast in a contest or question exceed the number to be elected or chosen for that contest or question, the votes for that contest or question shall not be counted. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(12)]

§11-152 Method of counting. (a) In an election using the paper ballot voting system, immediately after the close of the polls, the chairman of the precinct officials shall open the ballot box. The precinct officials at the precinct shall proceed to count the votes as follows:

- (1) The whole number of ballots shall first be counted to see if their number corresponds with the number of ballots cast as recorded by the precinct officials;

- (2) If the number of ballots corresponds with the number of persons recorded by the precinct officials as having voted, the precinct officials shall then proceed to count the vote cast for each candidate;
- (3) If there are more ballots or less ballots than the record calls for the precinct officials shall proceed as directed in section 11-153.

(b) In those precincts using the electronic voting system, the ballots shall be taken in the sealed ballot boxes to the counting center according to the procedure and schedule promulgated by the chief election officer to promote the security of the ballots. In the presence of official observers, counting center employees may start to count the ballots prior to the closing of the polls provided there shall be no printout by the computer or other disclosure of the polls. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(vv); am L 1975, c 36, §1(13); am L 1977, c 189, §1(10); am L 1980, c 264 §1(p)]

§11-153 More or less ballots than recorded. If there are more ballots than the poll book indicates, this shall be an overage and if less ballots, it shall be an underage. The election officials or counting center employees responsible for the tabulation of ballots shall make a note of this fact on a form to be provided by the chief election officer. The form recording the overage or underage shall be sent directly to the chief election officer or the clerk in county elections separate and apart from the other election records.

If the electronic voting system is being used in an election, the overage or underage may be recorded after the tabulation of the ballots. In an election using the

paper ballot voting system, the precinct officials shall proceed to count the vote cast for each candidate or on a question after recording the overage or underage.

As soon after the election as possible the chief election officer or the clerk shall make a list of all precincts in which an overage or underage occurred and the amount of the overage or underage. This Act shall be kept as a public record in the office of the chief election officer or the clerk in county elections and the clerk's office in counties other than the city and county of Honolulu in elections involving state candidates.

An election contest may be brought under part XI, if the overage or underage in any district could affect the outcome of an election. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(14)]

§11-154 Records, etc.; disposition. The final duty of the precinct officials in the operation of the precinct shall be to gather all records and supplies delivered to them and return them to the sending official, either the chief election officer or the county clerk.

The voted ballots shall be kept secure and handled only in the presence of representatives not of the same political party in accordance with regulations promulgated for the various voting systems. After all the ballots have been tabulated they shall be sealed in containers. Thereafter these containers shall be unsealed and resealed only as prescribed by rules and regulations governing the elections.

The ballots and other election records may be destroyed by the chief election officer or county clerk

when all elected candidates have been certified by the chief election officer, or in the case of candidates for county offices, by the county clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ww)]

§11-155 Certification of results of election. On receipt of certified tabulations from the election officials concerned, the chief election officer or county clerk in county elections shall compile, certify, and release the election results after the expiration of the time for bringing an election contest. The number of persons to be elected receiving the highest number of votes in any election district shall be declared to be elected. [L 1970, c 26, pt of §2; am L 1980, c 264, §1(q)]

§11-156 Certificate of election, form. The chief election officer or county clerk shall deliver certificates of election to the persons elected as determined under section 11-155. Those certificates shall be delivered only after the filing of expense statements by the person elected in accordance with part XII and after the expiration of the time for bringing an election contest. If there is an election contest the certificate shall be delivered only after a final determination in the contest has been made and the time for an appeal has expired. The certificate shall be substantially in the following form:

CERTIFICATE OF ELECTION

I, _____, chief election officer (county clerk) of Hawaii (county), do hereby certify that _____ was on the _____ day of _____ 19____, duly elected a _____ (name of office) _____ for the _____ district

for a term expiring on the _____ day of _____, A.D. 19____

Witness my hand this _____ day of _____, A.D. 19____

Chief Election Officer
(County Clerk)

[L 1970, c 26, pt of §2]

§11-157 In case of tie. In case of the failure of an election by reason of the equality of vote between two or more candidates, the tie may be decided by lot, under the supervision of the chief election officer or county clerk in the case of county elections. When an election is decided by lot, the candidates shall agree in a signed statement to the use of a lot. If the candidates agree, they shall be bound by the lot and shall not bring an election contest under part XI after the drawing of the lot. Each candidate shall be present at the drawing of the lot together with two witnesses to be selected by the candidate. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

* * *

PART I. NOMINATION; DETERMINATION OF CANDIDATES

§12-1 Application of chapter. All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise. [L 1970, c 26, pt of §2]

§12-1.5 REPEALED. L 1980, c 139, §1.

§12-2 Primary held when; candidates only those nominated. The primary shall be held at the polling place for each precinct on the second to the last Saturday of September in every even numbered year; provided that in no case shall any primary election precede a general election by less than forty-five days.

No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(a); am L 1975, c 36, §2(l); am L 1976, c 106, §2(l); am L 1979, c 122, §2; am imp L 1984, c 90, §1]

[§12-2.5] Nomination papers; when available. Nomination papers shall be made available from the first working day of February in every even-numbered year; provided that in the case of a special primary or special election, nomination papers shall be made available sixty days prior to the close of filing. [L 1979, c 133, §7]

§12-3 Nomination paper; format; limitations. (a) The name of no candidate shall be printed upon any official ballot to be used at any primary, special primary, or special election unless a nomination paper was filed in the candidate's behalf and in the name by which the candidate is commonly known. The nomination paper shall be in a form prescribed by the chief election officer containing substantially the following information:

- (1) A statement by the registered voters of the district from which the candidate is running signing the form that they are eligible to vote for the candidate at the next election;

- (2) A statement by the registered voters signing the form that they nominate the candidate for the office on the nomination paper;
- (3) The residence address and county in which the candidate resides;
- (4) The name of the candidate and the office for which the candidate is running, which name and office are to be placed on the nomination paper by the chief election officer or the clerk prior to releasing the form to the candidate;
- (5) Space for the names of the registered voters signing the form and their district or districts and precinct or precincts;
- (6) A certification by the candidate that the candidate will qualify under the law for the office the candidate is seeking;
- (7) A certification by a party candidate that the candidate is a member of the party;
- (8) A certification, where applicable, by the candidate that the candidate has complied with the provisions of Article II, section 7, of the Constitution of the State of Hawaii; and
- (9) The name the candidate wishes inserted on the ballot and the post office address of the candidate.

(b) No signatures shall be counted, unless they are upon the nomination paper having the format set forth above, written or printed thereon, and if there are separate sheets to be attached to the nomination paper, the sheets shall have the name of the person and the office for which the candidate is running placed thereon by the

chief election officer or the clerk. The nomination paper and separate sheets shall be provided by the chief election officer or the clerk.

(c) Nomination papers shall not be filed in behalf of any person for more than one party or for more than one office; nor shall any person file nomination papers both as a party candidate and as a nonpartisan candidate.

(d) The office for which the candidate is running and the candidate's name may not be changed from that indicated on the nomination paper and separate sheets. If the candidate wishes to run for an office different from that for which the nomination paper states, the candidate may request the appropriate nomination paper from the chief election officer or clerk and have it signed by the required number of voters [L 1970, c 26, pt of §2; am L 1973, c 217, §2(b); am L 1975, c 36, §2(2); am L 1979, c 139, §6; am L 1980, c 264, §2; am L 1983, c 34, §19]

§12-4 Nomination papers; qualifications of signers. No person shall sign the nomination papers of more than one candidate, partisan or nonpartisan, for the same office, unless there is more than one office in a class in which case no person shall sign papers for more than the actual number of offices in a class. Nomination papers shall be construed in this regard according to priority of filing, and the name of any person appearing thereon shall be counted only so long as this provision is not violated, and not thereafter.

No name on nomination papers shall be counted, unless the signer is a registered voter, eligible to vote for the candidate at the next election. To determine if the signers are eligible to vote for the candidate, the chief

election officer or clerk may use lists prepared in accordance with section 11-24. [L 1970, c 26, pt of §2, am L 1974, c 34, §2(a)]

§ 12-5 Nomination papers; number of signers. Nomination papers for candidates for members of Congress, governor, lieutenant governor, and the board of education shall be signed by not less than twenty-five registered voters of the State or of the Congressional district or school board district from which the candidates are running in the case of candidates for the United States House of Representatives or for the board of education.

Nomination papers for candidates for either branch of the legislature and for county office shall be signed by not less than fifteen registered voters of the district or county or subdivision thereof for which the person nominated is a candidate.

Nomination papers for candidates for members of the board of trustees of the office of Hawaiian affairs shall be signed by not less than twenty-five persons registered as prescribed under section 11-15(b). [L 1970, c 26, pt of §2; am L 1979, c 196, §6]

§12-6 Nomination papers; time for filing fees. (a) Nomination papers shall be filed as follows: for members of Congress, state, and county offices, and the board of trustees of the office of Hawaiian affairs, with the chief election officer, or clerk in case of county offices, not later than 4:30 p.m. on the sixtieth calendar day prior to the primary, special primary, or special election (but if such day is a Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding); provided that any state candidate from the counties

of Hawaii, Maui, and Kausai may file the declaration of candidacy with the respective clerk. The clerk shall transmit to the office of the chief election officer the state candidate's declaration of candidacy without delay. However, if a special primary or special election is to be held by a county and the county charter requires that the council shall issue a proclamation calling for the election to be held within a specified period of time, and if that requirement would not allow the filing of nomination papers with the appropriate office by the sixtieth calendar day prior to the day for holding the special primary or special election, the council shall establish the deadline for the filing of nomination papers in the proclamation calling for the election.

(b) There shall be deposited with each nomination paper a filing fee on account of the expenses attending the holding of the primary, special primary, or special election which shall be paid into the treasury of the State, or county, as the case may be, as a realization.

- (1) For United States senators and United States representatives - \$75;
- (2) For governor and lieutenant governor - \$750;
- (3) For mayor - \$500; and
- (4) For all other offices - \$250.

(c) Upon the receipt by the chief election officer or the clerk of the nomination paper of a candidate, the day, hour, and minute when it was received shall be endorsed thereon.

(d) Upon the showing of a certified copy of an affidavit which has been filed with the campaign spending commission pursuant to section 11-208 by a candidate who has voluntarily agreed to abide by spending limits, the chief election officer or clerk shall discount the filing fee of the candidate by the following amounts:

- (1) For the office of governor and lieutenant governor - \$675;
- (2) For the office of mayor - \$450; and
- (3) For all other offices - \$225.

(e) The chief election officer or clerk shall waive the filing fee in the case of a person who declares, by affidavit, that the person is indigent and who has filed a petition signed by currently registered voters who constitute at least one-half of one per cent of the total voters registered at the last preceding general election in the respective district or districts which correspond to the specific office for which the indigent person is a candidate. This petition shall be submitted on the form prescribed and provided by the chief election officer together with the nomination paper required by this chapter. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(c); am L 1974, c 34, §2(b); am L 1975, c 36, §2(3); am L 1976, c 106, §2(2); am L 1977, c 189, §2(1); am L 1979, c 196, §7 and c 224, §5; am L 1983, c 34, §20]

§12-7 Filing of oath. The name of no candidate for any office shall be printed upon any official ballot, in any election, unless the candidate shall have taken and subscribed to the following written oath or affirmation, and filed the oath with the candidate's nomination papers.

The written oath or affirmation shall be in the following form:

"I, ___, do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as ___ (name of office) ___ to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God."

Upon being satisfied as to the sincerity of any person claiming that the person is unwilling to take the above prescribed oath only because the person is unwilling to be sworn, the person may be permitted, in lieu of the oath, to make the person's solemn affirmation which shall be in the same form as the oath except that the words "sincerely and truly affirm" shall be substituted for the word "swear" and the phrases "on oath" and "So help me God" shall be omitted. Such affirmation shall be of the same force and effect as the prescribed oath.

The oath or affirmation shall be subscribed before the officer administering the same, who shall endorse thereon the fact that the oath was subscribed and sworn or the affirmation was made together with the date thereof and affix the seal of the officer's office or of the court of which the officer is a judge or clerk.

It shall be the duty of every notary public or other public officer by law authorized to administer oaths to administer the oath or affirmation prescribed by this section and to furnish the required endorsement and

authentication. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§12-8 Nomination papers: challenges; evidentiary hearings and decisions. (a) All nomination papers filed in conformity with section 12-3 shall be deemed valid unless objection is made thereto by the chief election officer or the clerk in the case of county offices or by a registered voter in writing. Such objection is to be made not later than 4:30 p.m. on the second day after the close of filing except that if such day falls on a Saturday, Sunday, or holiday then the next succeeding working day. In case objection is made, notice thereof shall be given including the placement of the notice in the mail by registered or certified mail to the candidate objected thereto.

(b) The chief election officer or the clerk in the case of county offices shall have the necessary powers and authority to conduct evidentiary hearings and may administer oaths. The hearings shall be held not later than four working days after the objection is made. Nothing in this subsection shall be construed to extend to the candidate a right to an administrative contested case hearing as defined in section 91-1(5).

(c) All objections shall be decided by the chief election officer or clerk in the case of county offices not later than 4:30 p.m. on the second day after they are made or the second day after the hearing is held. All objections which are upheld shall be placed in writing by the deciding official if so requested by the candidate affected. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(d); am L 1975, c 36, §2(4); am L 1977, c 189, §2(2)]

§12-9 List of candidates. As soon as possible but not later than 4:30 p.m. on the fifth day after the close of filing the chief election officer shall transmit to each county clerk and the county clerk shall transmit to the chief election officer certified lists containing the names of all persons, the office for which each is a candidate, and their party designation, or designation of nonpartisanship, as the case may be, for whom nomination papers have been duly filed in his office and who are entitled to be voted for at the primary, special primary or special election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(e)]

* * *

PART II. BALLOTS

§12-21 Official party ballots. There shall be only one primary or special primary ballot for each party qualifying under the provisions of sections 11-61 or 11-62.

The primary or special primary ballot shall be clearly designated as such, and shall also be designated according to party. The names of candidates shall be arranged as provided for in section 11-115; provided that in elections using the electronic voting system, the names of all candidates seeking the same office shall be printed on the same side of the ballot card; provided further that if the names of all candidates seeking the same office exceed the maximum number of voting positions on a single side of a ballot card, such names shall then be arranged and listed on both sides of the ballot card or on separate ballot cards.

The chief election officer or the county clerk, in the case of county elections, shall approve printed samples or proofs of the respective party ballots as to uniformity of size, weight, shape, and thickness prior to final printing of the official ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(f); am L 1979, c 139, §7; am L 1981, c 214, §1]

§12-22 Official nonpartisan ballots. There shall be only one primary or special primary ballot containing the names of all nonpartisan candidates to be voted for and the offices for which they are candidates. The ballot shall be clearly designated as the nonpartisan primary or special primary ballot and shall conform in all other respects to the requirements relative to official party ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(g); am L 1979, c 139, §8]

§12-23 REPEALED. L 1979, c 125, §4.

* * *

PART III. BALLOT SELECTION

§ 12-31 Selection of party ballot; voting. No person eligible to vote in any primary or special primary election shall be required to state a party preference or nonpartisanship as a condition of voting. Each voter shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates. If the primary or special primary ballot is marked contrary to this paragraph, the ballot shall not be counted.

In any primary or special primary election in the year 1979 and thereafter, a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1974, c 34, §2(c); am L 1979, c 139, §9; am imp L 1984, c 90, §1]

* * *

PART IV. ELECTION RESULTS

§ 12-41 Result of election. (a) The person or persons receiving the greatest number of votes at the primary or special primary as a candidate of a party for an office shall be the candidate of the party at the following general or special general election but not more candidates for a party than there are offices to be elected; provided that any candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall, after the primary or special primary election, be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.

(b) Any nonpartisan candidate receiving at least ten per cent of the total votes cast for the office for which the person is a candidate at the primary or special primary, or a vote equal to the lowest vote received by the partisan candidate who was nominated at the primary or special

primary, shall also be a candidate at the following election; provided that when more nonpartisan candidates qualify for nomination than there are offices to be voted for at the general or special general election, there shall be certified as candidates for the following election those receiving the highest number of votes, but not more candidates than are to be elected. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1979, c 139, §10; am L 1983, c 34, §21]

§12-42 Unopposed candidates declared elected. (a) Any candidate running for any office in the State of Hawaii in a special election or special primary election who is the sole candidate for that office shall, after the close of filing of nomination papers, be deemed and declared to be duly and legally elected to the office for which the person is a candidate. The term of office for a candidate elected under this subsection shall begin respectively on the day of the special election or on the day of the immediately succeeding special general election.

(b) Any candidate running for any office in the State of Hawaii in a special general election who was only opposed by a candidate or candidates running on the same ticket in the special primary election and is not opposed by any candidate running on any other ticket, nonpartisan or otherwise, and is nominated at the special primary election shall, after the special primary, be deemed and declared to be duly and legally elected to the office for which the person is a candidate at the special primary election regardless of the number of votes received. The term of office for a candidate elected under this subsection shall begin on the day of the special general election. [L 1974, c 34, §2(d); am L 1985, c 203, §6]

* * *

PART I. GENERAL PROVISIONS

§16-1 Voting systems authorized. The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the elections.

Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in one or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under the paragraph it need not meet the requirements of section 16-12. [L 1970, c 26, pt of §2]

§16-2 Voting system requirements. All voting systems adopted under this chapter by the chief election officer for the legislature shall satisfy the following requirements:

- (1) It shall secure to the voter secrecy in the act of voting;
- (2) It shall provide for voting for all candidates of as many political parties as may make nominations, nonpartisans, and for or against as many questions as are submitted;

- (3) It shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions. [L 1970, c 26, pt of §2]

* * *

PART II. VOTING MACHINE SYSTEM

§ 16-11 Definitions. "Protective counter" means an apparatus built into the voting machine which cannot be reset, which records the total movement of the operating lever.

"Voting machine system" means the method of electrically, mechanically, or electronically recording and counting votes upon being cast. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(2)]

§ 16-12 Voting machines; requirements. No voting machine shall be installed for use in any election in the State unless it shall satisfy the following requirements:

- (1) It shall permit the voter to vote for as many persons for an office as the voter is lawfully entitled to vote for, but no more;
- (2) It shall prevent the voter from voting for the same persons more than once for the same office;
- (3) It shall permit the voter to vote for or against any question the voter may have the right to vote on, but no other;
- (4) In special primary and primary elections it shall be so equipped that it will lock out all rows except those of the party or nonpartisan candidates selected by the voter;

- (5) It shall be provided with a protective counter or protective device whereby any operation of the machine before or after the election will be detected;
- (6) It shall be provided with a counter which shall show at all times during an election how many persons have voted;
- (7) It shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(a); am L 1980, c 264, §5(a); am imp L 1984, c 90, §1]

* * *

PART III. PAPER BALLOT VOTING SYSTEM

§16-21 Definition. "Paper ballot voting system" means the method of recording votes which are counted manually. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(4)]

§16-22 Marking. The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting by paper ballot. [L 1970, c 26, pt of §2; am L 1984, c 90, §1]

§16-23 Paper ballot; voting. Upon receiving the ballot the voter shall proceed into one of the voting booths provided for the purpose, and shall mark the voter's ballot in the manner prescribed by section 16-22.

The voter shall then leave the booth and deliver the ballot to the precinct official in charge of the ballot boxes.

The precinct official shall be sufficiently satisfied that there is but one ballot enclosed, whereupon the ballot shall be immediately dropped into the proper box by the precinct official. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(b); am L 1977, c 189, §4; am imp L 1984, c 90, §1]

§16-24 Count, public. Insofar as the limits of the room in which the voting takes place reasonably allow, no person shall be prevented from attending the counting of the ballots on election day, unless it is necessary to preserve the peace. [L 1970, c 26, pt of §2]

§16-25 Order and method of counting. Each ballot shall be counted and finished as to all the candidates thereon before counting a second and subsequent ballots. Except as provided in section 11-71, the ballots shall be counted by teams in the following manner only: by one precinct official announcing the vote in a loud clear voice, one precinct official tallying the vote, one precinct official watching the precinct official announcing the vote and one precinct official watching the precinct official tallying the vote. The precinct official doing the announcing or tallying and the precinct official watching him shall not be of the same political party. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(c)]

§16-26 Questionable ballots. A ballot shall be questionable if:

- (1) A ballot contains any mark or symbol whereby it can be identified, or any mark or symbol contrary to the provisions of law; or
- (2) Two or more ballots are found in the ballot box so folded together as to make it clearly

evident that more than one ballot was put in by one person, the ballots shall be set aside as provided below.

Each ballot which is held to be questionable shall be endorsed on the back by the chairman of precinct officials with the chairman's name or initials, and the word "questionable". All questionable ballots shall be set aside uncounted and disposed of as provided for ballots in sections 11-54. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(d); am imp L 1984, c 90, § 1]

§ 16-27 Number of blank and questionable ballots; record of. In addition to the count of the valid ballots, the precinct officials shall, as to each separate official ballot, also determine and record the number of totally blank ballots and the number of questionable ballots. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(e)]

§ 16-28 Declaration of results. When the precinct officials have ascertained the number of votes given for each candidate they shall make public declaration of the whole number of votes cast, the names of the persons voted for, and the number of votes for each person. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(f)]

§ 16-29 Tally sheets. The tally sheets in counting the ballots cast shall be marked and handled in a secure fashion prescribed in rules and regulations promulgated by the chief election officer in accordance with chapter 91. [L 1970, c 26, pt of § 2]

* * *

PART IV. ELECTRONIC VOTING SYSTEM

§ 16-41 Definitions. "Counting center" means the computer facilities and surrounding premises designated by the chief election officer or the clerk in county elections where electronic voting system ballots are counted.

"Defective ballot" means any ballot delivered to the counting center in accordance with section 11-152 that cannot be read by the ballot reading device.

"Electronic voting system" means the method of recording votes which are counted by automatic tabulating equipment. [L 1970, c 26, pt of § 2; am L 1975, c 36, § 5(6)]

§ 16-42 Electronic voting requirements. When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections the equipment shall reject all votes for an office when the number of votes therefore exceeds the number which the voter is entitled to cast. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 6(g); am L 1979, c 139, § 12]

§ 16-43 Ballot handling. In every case where the ballots are handled by election officials or election employees, from the time the ballots are delivered to the several precincts to the time they are returned to the chief election officer or clerk in county elections for disposition upon completion of the tabulation, they shall be handled in the presence of not less than two officials assigned in accordance with sections 11-71 and 11-72 or section 16-45. [L 1970, c 26, pt of § 2; am L 1975, c 36, § 5(7)]

§ 16-44 Counting center employees. (a) The chief election officer or clerk in county elections shall designate counting center employees who will be responsible for the tabulation of the ballots.

(b) Counting center employees shall follow the procedures established by the chief election officer for the tabulation of the ballots. [L 1970, c 26, pt of § 2; am L 1975, c 36, § 5(8)]

§ 16-45 Official observers. Official observers shall be designated by the chief election officer or the clerk in county elections to be present at the counting centers and selected in the following manner:

- (1) No less than one official observer designated by each political party;
- (2) No less than one official observer from the news media;
- (3) Additional official observers as space and facilities permit designated by the chief election officer in state elections and the clerk in county elections.

The chief election officer or clerk shall give all official observers reasonable notice of the time and place where the ballots shall be counted. No person shall be permitted in the counting center without the written authorization of the chief election officer or clerk. [L 1975, c 36, § 5(9)]

§ 16-46 Counting defective ballots. Counting center employees in the presence of at least two official observers shall prepare a new ballot to replace each defective ballot. The defective ballots shall be segregated and the replacement ballots counted pursuant to rules

promulgated by the chief election officer. [L 1975, c 36, § 5(9)]

[§ 16-47] Preparation of absentee ballots. Counting center employees in the presence of at least two official observers shall prepare absentee ballots for counting by automatic tabulating equipment in a manner that shall accurately reflect the votes cast by the absentee voters. [L 1980, c 264, § 5(b)]

* * *

§ 17-1 United States senator. When a vacancy occurs in the office of United States senator the vacancy shall be filled for the unexpired term at the following state general election, provided that the vacancy occurs not later than 4:30 p.m. on the sixtieth day prior to the primary for nominating candidates to be voted for at the election; otherwise at the state general election next following. The chief election officer shall issue a proclamation designating the election for filling vacancy. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy and shall be a registered member of the same political party as the senator causing the vacancy. All candidates for the unexpired term shall be nominated and elected in accordance with this title. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(a)]

§ 17-2 United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the

vacancy unless the unexpired term is for less than one hundred eighty days. If the unexpired term is less than one hundred eighty days; the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person the appointee succeeds. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matters as provided for in section 11-19 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title. Pending the election, the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy and shall be registered member of the same political party as the representative causing the vacancy. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(b); am L 1974, c 34, § 4(a); am imp L 1984, c 90, § 1]

§ 17-3 State senator. Whenever any vacancy in the membership of the state senate occurs, the term of which ends at the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be the same

political party or nonpartisanship as the person the appointee succeeds.

In the case of a vacancy, the term of which does not end at the next succeeding general election:

- (1) If it occurs not later than on the tenth day prior to the close of filing for the next succeeding primary election, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall be nominated and elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.
- (2) If it occurs later than on the tenth day prior to the close of filing for the next succeeding primary election but not later than on the thirtieth day prior to the next succeeding primary election, or if there are so qualified candidates for any party or nonpartisan candidates qualified for the primary election ballot, nominations for the unexpired term may be filed not later than 4:30 p.m. on the thirtieth day prior to the next succeeding primary election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Pending the election the governor shall

make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

- (3) If it occurs after the thirtieth day prior to the next succeeding primary but not later than on the thirtieth day prior to the next succeeding general election, or if there are no qualified candidates for any party or nonpartisan candidates in the primary, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Party candidates for the unexpired senate term shall be nominated by the county committees of the parties not later than 4:30 p.m. on the thirtieth day prior to the general election; nonpartisan candidates may file nomination papers for the unexpired term not later than 4:30 p.m. on the thirtieth day prior to the general election with the nonpartisan candidate who is to be nominated to be decided by lot, under the supervision of the chief election officer. The candidates for the unexpired term shall be elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill such vacancy. The appointee shall be of the same political

party or nonpartisanship as the person the appointee succeeds.

- (4) If it occurs after the thirtieth day prior to the next succeeding general election or if no candidates are nominated, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(c); am L 1980, c 247, § 2; am imp L 1984, c 90, § 1]

§ 17-4 State representatives. Whenever any vacancy in the membership of the state house of representatives occurs, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person the appointee succeeds. [L 1970, c 26, pt of § 2; am imp L 1984, c 90, § 1]

§ 17-5 Failure to elect. Whenever any vacancy occurs in the offices provided in this chapter because of failure to elect a person at an uncontested general election, the chief election officer shall issue a proclamation for a special primary and general election. The special primary election shall be held not sooner than on the seventy-fifth day and not later than on the one hundred twentieth day after the issuance of the proclamation and the special general election shall be held not sooner than on the twentieth day and not later than on the thirtieth day after the special primary election. Nomination papers shall be filed in accordance with section 12-6. [L 1971, c 174 § 1; am L 1973, c 217, § 7(d)]

§ 17-6 Board of education members. (a) The governor shall make an appointment to fill any vacancy in the membership of the board of education for the unexpired term of that vacancy whenever a vacancy occurs and the term of that vacancy ends at the time of the next succeeding general election.

(b) In the case of a vacancy, the term of which does not end at the time of the next succeeding general election:

- (1) If it occurs not later than on the thirtieth day prior to the next succeeding general election, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall file nomination papers not later than 4:30 p.m. on the thirtieth day prior to the general election (but if such day is a Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding) and shall be elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill such vacancy.
- (2) If it occurs after the thirtieth day prior to the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term.

(c) All appointments made by the governor under this section shall be made without consideration of the

appointee's party affiliation or preference or nonpartisanship, however the persons so appointed shall meet the residency requirement specified in section 13-1. [L 1979, c 125, § 2; am L 1980, c 247, § 3; am L 1981, c 100, § 3; am L 1985, c 170, § 1]

§ 17-7 Board of trustees, office of Hawaiian affairs.

(a) Whenever any vacancy in the membership of the board of trustees occurs, the term of which ends at the next succeeding special election held in conjunction with the general election, the vacancy shall be filled by a two-thirds vote of the remaining members of the board. If the board fails to fill the vacancy within sixty days after it occurs, the governor shall fill the vacancy within ninety days after the vacancy occurs. When island residency is required under section 13D-1, the person so appointed shall reside on the island from which the vacancy occurred, and shall serve for the duration of the unexpired term.

(b) In the case of a vacancy, the term of which does not end at the next succeeding special election held in conjunction with the general election:

- (1) If it occurs not later than on the thirtieth day prior to the next succeeding special election held in conjunction with the general election, the vacancy shall be filled for the unexpired term at the next succeeding special election held in conjunction with the general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall file nomination papers not later than 4:30 p.m. on the thirtieth day prior to the special

election (but if such day is Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding) and shall be elected in accordance with this title. Pending the election, the board or the governor shall make a temporary appointment to fill the vacancy in the manner prescribed under subsection (a). When island residency is required under section 13D-1, the person so appointed shall reside on the island from which the vacancy occurred, and shall serve for the duration of the unexpired term and shall serve until the election of the person duly elected to fill such vacancy.

- (2) If it occurs after the thirtieth day prior to the next succeeding special election held in conjunction with the general election, the board or the governor shall make an appointment to fill the vacancy in the manner prescribed under subsection (a). When island residency is required under section 13D-1, the person so appointed shall reside on the island from which the vacancy occurred, and shall serve for the duration of the unexpired term.

(c) All appointments made by the board or the governor under this section shall be made without consideration of the appointee's party preference or nonpartisanship. [L 1979, c 196, § 9; am L 1980, c 247, § 4]

AMENDMENTS TO HAWAII REVISED STATUTES

PART V. PARTIES

§ 11-61 "Political party" defined. (a) The term "political party" means any party which has qualified as a political party under sections 11-62 and 11-64 and has not been disqualified by this section. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements or the requirements set forth in sections 11-62 to 11-63, shall be subject to disqualification:

- (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraphs (2) to (5) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term;
- (2) The party received at least ten per cent of all votes cast for any of the offices voted upon by all the voters in the State;
- (3) The party received at least ten per cent of all the votes cast in at least fifty per cent of the congressional districts;

- (4) The party received at least ten per cent of all the votes cast in at least the six senatorial districts with the lowest votes cast for the office of state senator; or
- (5) The party received at least ten per cent of all the votes cast in at least fifty per cent of the representative districts for the office of state representative. [L 1970, c 26, pt of § 2; am L 1979, c 125, § 3(1); am L 1983, c 34, § 3; am L 1986, c 323, § 1]

§ 11-62 Qualification of political parties; petition.

(a) Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as hereinafter provided. The petition for qualification as a political party shall:

- (1) Be filed not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary;
- (2) Declare as concisely as may be the intention of signers thereof to qualify as a statewide political party in the State and state the name of the new party;
- (3) Contain the signatures of currently registered voters comprising not less than one per cent of the total registered voters of the State as of the last preceding general election;
- (4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules; and

- (5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any other political party. All objections shall be made not later than 4:30 p.m. on the tenth day after the petition has been filed. If no objections are raised by 4:30 p.m. on the tenth day, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the petition or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing.

(d) Each group of persons desiring to qualify as a political party shall qualify under this section for three general elections, after which the group shall be deemed a political party for the following ten-year period, provided that each party qualified under this section shall continue to field candidates for public office during the ten year period following qualification. After each ten-year period, the party qualified under this section shall either remain qualified under the standards set forth in section 11-61, or requalify under this section 11-62. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 1(p); am L 1983, c 34, § 4; am L 1986, c 323, § 2]

§ 11-63 Party rules, amendments to be filed. All parties must file their rules with the chief election officer

not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary. All amendments shall be filed with the chief election officer not later than 4:30 p.m. on the thirtieth day after their adoption. The rules and amendments shall be duly certified to by an authorized officer of the party and upon filing, the rules and amendments thereto shall be a public record. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 1(q); am L 1983, c 34, § 5; am L 1986, c 323, § 3]

* * *

§ 11-118 Vacancies; new candidates; insertion of names on ballots. In case of death, withdrawal, or disqualification of any party candidate after filing, the vacancy so caused may be filled by the appropriate committee of the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification. If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m. on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order. The chief election officer or county clerk in county elections may waive any or all of the foregoing requirements in special circumstances as provided in the rules adopted by the chief election officer. If no substitution is made, the candidacy involved shall be declared vacant. [L 1970, c 26, pt of § 2; am L 1973, c

217, § 1(jj); am L 1980, c 247, § 1; am L 1983, c 34, § 16; am L 1986, c 305, § 1]

* * *

PART II. BALLOTS

§ 12-21 Official party ballots. The primary or special primary ballot shall be clearly designated as such. The names of the candidates of each party qualifying under section 11-61 or 11-62 and of nonpartisan candidates may be printed on separate ballots, or on a single ballot. The name of each party and the nonpartisan designation shall be distinctly printed and sufficiently separate from each other. The names of all candidates shall be printed on the ballot as provided in section 11-115. When the names of all candidates of the same party for the same office exceed the maximum number of voting positions on a single side of a ballot card, the excess names may be arranged and listed on both sides of the ballot card and additional ballot cards if necessary. When separate ballots for each party are not used, the order in which parties appear on the ballot, including nonpartisan, shall be determined by lot.

The chief election officer or the county clerk, in the case of county elections, shall approve printed samples or proofs of the respective party ballots as to uniformity of size, weight, shape, and thickness prior to final printing of the official ballots. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 2(f); am L 1979, c 139, § 7; am L 1981, c 214, § 1; am L 1987, c 232, § 2]

* * *

[§ 15-3.5] Federal write-in absentee ballot. Notwithstanding the provisions of this chapter and chapters 11 and 16, the federal write-in absentee ballot for overseas voters in general elections for federal office which must be prescribed under section 1973ff of title 42, United States Code, as amended, may be used in general elections for federal offices. [L 1987, c 211, § 1]

§ 15-4 Request for absentee ballot. Any person registered to vote may request an absentee ballot in person or in writing from the clerk not earlier than on the sixtieth day and not later than 4:30 p.m. on the seventh day prior to the election. Any mailed requests for an absentee ballot shall be mailed by the person directly to the clerk. The clerk may waive any or all of the foregoing requirements in special cases as provided in the rules adopted by the chief election officer.

The request shall include information such as the person's social security number, date of birth, and the address under which the person is registered to vote. The request shall also include the address to which the person wishes the requested ballot forwarded. The request, when made for any primary or special primary election, may include an additional request for an absentee ballot to be voted at any election immediately following the primary or special primary provided the person so indicates in the person's request.

Subsequent to the closing of registration for each election, the clerk may mail a request form for an absentee ballot to each voter in a remote area who has not

already made such a request. The request form shall be accompanied by:

- (1) A stamped, self-addressed envelope; and
- (2) Instructions regarding the manner of completing and returning the request form. [L 1975, c 36, pt of § 3; am L 1980, c 248, § 1(b); am L 1981, c 29, § 1(2); am imp L 1984, c 90, § 1; am L 1986, c 305, § 5]

* * *

§ 17-2 United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the vacancy. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matter as provided for in section 11-91 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title. [L 1970, c 26, pt of § 2; am L 1973, c 217, § 7(b); am L 1974, c 34, § 4(a); am imp L 1984, c 90; § 1; am L 1986, c 305, § 6]

Hawaii House Standing Committee Rep. No. 762-86, reprinted from 1986 Haw. H.J. 1370. -

SCRep. 762-86 Judiciary on 3.B. No. 303

The purpose of this bill is to amend the requirements by which a political party qualifies and remains qualified to appear on the ballot in State elections.

The bill provides that a party may qualify by petition as well as by election result. The bill further provides that if a party qualifies through petition for three consecutive general elections, it will be deemed a political party for the following ten year period.

Your Committee heard testimony in support of the bill from the Lieutenant Governor and the Libertarian Party of Hawaii. The Libertarian Party testified that it is sometimes difficult to field a sufficient number of candidates to remain qualified as a party and further that the percentage of votes required to remain qualified is among the highest in the nation.

Your Committee finds that qualifying by petition is an acceptable alternative to qualifying by election results which is a continuous process.

Your Committee amended the bill to delete the provision that parties previously qualified under section 11-61, HRS, requalify after the bill is passed. Your Committee believes that parties presently qualified should not have to immediately requalify.

Your Committee further amended the bill to require that a party who qualifies by petition continue to field candidates for political office during the ten year period following qualification. Your Committee believes that the party must continue to field candidates in order to remain a viable party.

Your Committee also made certain technical, non-substantive amendments for style and clarity.

Your Committee on Judiciary is in accord with the intent and purpose of S.B. No. 303, S.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 303, S.D. 1, H.D. 1, and be placed on the calendar for Third Reading.

Signed by all members of the Committee.

* * *

Hawaii Constitution, Article III, § 4 (1988)

ELECTION OF MEMBERS; TERM

Section 4. Each member of the legislature shall be elected at an election. If more than one candidate has been nominated for election to a seat in the legislature, the member occupying that seat shall be elected at a general election. If a candidate nominated for a seat at a primary election is unopposed for that seat at the general election the candidate shall be deemed elected at the primary election. The term of office of a member of the house of representatives shall be two years and the term of office of a member of the senate shall be four years. The term of a member of the legislature shall begin on the day of the general election at which elected or if elected at a primary election on the day of the general election immediately following the primary election at which elected. For a member of the house of representatives, the term shall end on the day of the general election immediately following the day the member's term commences. For a member of the senate, the term shall end on the day

of the second general election immediately following the day the member's term commences. [Ren Const Con 1978 and election Nov 7, 1978; am HB 572 (1987) and election Nov 8, 1988]

APPENDIX "C"

Article I, § 4, clause 1 of the Constitution provides

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]

The Tenth Amendment to the Constitution provides

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article I, § 4 of the Hawaii Constitution of 1978 provides

No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to the petition the government for a dress of grievances.

Article I, § 5 of the Hawaii Constitution of 1978 provides

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Gov-
ernor of Hawaii; BENJAMIN
CAYETANO, in his capacity
as Lieutenant Governor of
the State of Hawaii,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Mary Blaine Johnston
90 Central Avenue
Wailuki, Maui, Hawaii 96793
(808) 244-8750

Alan B. Burdick
820 Mililani Street
Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. THE PETITION WAS TIMELY FILED ..	3
II. PETITIONER DOES NOT LACK PRUDENTIAL STANDING TO SUE	5
CONCLUSION	8

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	5
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	1
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	2, 3
<i>Bowman v. Loperena</i> , 311 U.S. 262 (1941)	4, 5
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	1, 6
<i>Carrington v. Rash</i> , 380 U.S. 89 (1965)	1, 6
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	1, 6
<i>England v. Louisiana Board of Examiners</i> , 375 U.S. 411 (1964)	3
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989)	1, 2, 6
<i>Kramer v. Union Free School District</i> , 395 U.S. 621 (1969)	1
<i>Missouri v. Jenkins</i> , ___ U.S. ___, 110 S.Ct. 1651 (1990)	4
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	1

Page

<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	1
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	1, 2, 6

RULES

Federal Rules of Appellate Procedure	
Rule 40	3
Rules of the Supreme Court of the United States	
Rule 13.4	3

APPENDIX A	1a
-------------------------	----

APPENDIX B	1b
-------------------------	----

INTRODUCTION

In this case, petitioner contends that the right to vote for the candidate of one's choice is a right guaranteed by the First and Fourteenth Amendments to the federal Constitution; that this fundamental right to vote entitles petitioner to utilize his franchise to express his dissatisfaction with the range of choices presented on the ballot and to vote, instead, by writing-in the names of his preferred candidate or candidates; and that Hawaii's blanket prohibition against write-in voting impermissibly burdens this fundamental right of petitioner where, as here, the total ban against write-in voting cannot be shown to be "necessary" or "narrowly tailored" to the advancement of any substantial governmental interests.

Respondents' Brief in Opposition seeks to sidestep the force of these claims by portraying this case as little more than a run-of-the-mill "ballot access" controversy. Respondents' strategic interest in characterizing the case in this fashion is transparently obvious. For, under this Court's jurisprudence respecting rights of electoral participation, the Court has often been quite deferential in its review of state laws that regulate access to the ballot by candidates and by political parties. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974). By contrast, this Court has typically imposed a more stringent level of judicial scrutiny upon laws that have been shown to abridge directly the fundamental right to vote, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965), or fundamental rights of political expression and association. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Properly understood, this is a case where Hawaii

policy directly burdens the right to vote and the rights of political expression and association. But, given the state of this Court's jurisprudence, one can well understand why respondents would seek to characterize this as a "ballot access" case where the burden on the right to vote is only indirect and where judicial deference to the state is far greater. Respondents' characterization of this case is ultimately misplaced. Nevertheless, the two dramatically different conceptions of this case adopted by petitioner and respondents mirror, to some degree, the differing conceptions adopted by the Fourth Circuit and the Ninth Circuit with respect to write-in voting. And, as indicated in the petition for *certiorari*, review should be granted by this Court to resolve the sharply conflicting conceptual approaches toward write-in voting embraced by the Fourth and Ninth Circuits.

Review should also be granted because the Ninth Circuit misconstrued and misapplied the standard set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Anderson* provides a flexible analytic standard that is broad enough to encompass the full panoply of cases involving the constitutional right of electoral participation -- cases that range from challenges to laws that directly burden the right to vote and the right of political expression to challenges that attack the manner in which a state regulates candidate access to the ballot. But, if *Anderson* is to be reconciled with cases like *Tashjian* and *Eu*, it must be seen as incorporating a standard of heightened scrutiny in circumstances where a statute or policy directly or substantially burdens fundamental rights. Accordingly, where, as here, Hawaii's policy directly burdens the fundamental right to vote as well as rights of political expression and association, the proper application of the *Anderson* standard requires that the state demonstrate a genuinely close fit between the law in question and the interests that the law purports to advance. The Ninth Circuit below demanded no such genuinely close fit. In this regard, the court below mis-

applied the *Anderson* standard. And for this reason, as well, *certiorari* should be granted by this Court.

These arguments in support of *certiorari* are amply set forth in the petition previously filed with the Court. No rehearsal of these arguments is necessary or appropriate here. Instead, this Reply Brief addresses two issues raised, for the first time, in respondents' Brief in Opposition.¹ Those issues are (1) whether the petition was untimely filed; and (2) whether petitioner lacks "prudential" standing in this case. Each of these issues will be addressed, in turn.

ARGUMENT

I. THE PETITION WAS TIMELY FILED

Rule 13.4 of the Supreme Court Rules provides, in part, that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of *certiorari* . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Thus, respondents' suggestion that "there is some doubt that the Petition is timely" (Brief in Opposition at 29) turns upon the claim that Burdick's petition for rehearing in the Ninth Circuit was not timely filed. But, in this respect, respondents are simply wrong. The petition for rehearing was timely filed in the court below.

Rule 40 of the Federal Rules of Appellate Procedure provides, in part, that "[a] petition for rehearing

¹ Respondents raise a third issue not addressed in the petition. Respondents contend that petitioner waived his federal claims by failing to follow the procedures commended by this Court in *England v. Louisiana Board of Examiners*, 375 U.S. 411 (1964). Respondents' contention, in this regard, is utterly without merit. This contention was previously considered by the court below and properly rejected by the Ninth Circuit. (Appendix to Petition at 16a-17a).

may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." In this case, the time for Burdick to file a petition for rehearing with a suggestion for rehearing *en banc* was enlarged from 14 to 21 days by order of the Ninth Circuit, dated April 15, 1991. (See Appendix to Brief in Opposition at 1a-2a).² Burdick's petition for rehearing with a suggestion for rehearing *en banc* was filed in compliance with the court's order of April 15, 1991 and was, therefore, timely. Accordingly, the petition for a writ of *certiorari* filed in this Court within 90 days of the Ninth Circuit's June 28, 1991 denial of Burdick's petition for rehearing is timely.

Petitioner is reinforced in this conclusion by the very case cited by respondents in support of the suggestion that the instant petition is untimely. In *Bowman v. Loperena*, 311 U.S. 262, 266 (1941), this Court observed:

² The April 15, 1991 order of the Ninth Circuit, by its terms, granted Burdick's "motion for an extension of time to file a petition for rehearing *en banc* from 14 days to 21 days" While the order referred ambiguously and incorrectly to "a petition for rehearing *en banc*," it is clear that Burdick's motion to the Ninth Circuit was denominated as one "for an extension of time to file petition for rehearing with suggestion for rehearing *en banc*." (The motion without its supporting affidavit is appended to this Reply Brief as Appendix A.) It is also clear that the underlying petition submitted to the Ninth Circuit described itself as a "Petition for Rehearing With Suggestion For Rehearing *En Banc*." (The cover page from the Petition for Rehearing is reproduced as Appendix B to this Reply Brief.) And, finally, it is clear that the Ninth Circuit treated the petition as a petition for rehearing with a suggestion for rehearing *en banc*. In issuing its June 28, 1991 decision, the court expressly "denied" the petition for rehearing and "rejected" the suggestion for rehearing *en banc*. (See Order of the Court of Appeals set forth in the Appendix to Petition at 4a-5a). Thus, despite the ambiguity of the court's order of April 15, 1991, the "Court of Appeals interpreted and actually treated [Burdick's] papers as including a petition for rehearing before the panel." See *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 1661 (1990).

The filing of an untimely petition for rehearing which is not entertained or considered on the merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time to appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial and the time for appeal runs from the date thereof.

In this case, the court below extended, by court order, the time within which to file the petition for rehearing and after considering the merits denied the petition -- although not without also withdrawing the court's earlier opinion and entering a new opinion. Under these circumstances and upon the standards articulated by this Court in *Bowman v. Loperena*, the instant petition was timely filed.

II. PETITIONER DOES NOT LACK PRUDENTIAL STANDING TO SUE

Respondents contend that Burdick lacks "prudential" standing to pursue the claims that he advances here. In this regard, respondents assert that principles of "prudential" standing require "that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (Brief in Opposition at 19). Respondents further maintain that, under this Court's election decisions, the Constitution only protects voters who seek to associate with "minor party or independent candidates" who are "frozen out" of the political process; and that, in this case, where petitioner has not identified any such candidate that he would seek to support, principles of "prudential" standing

are not satisfied. (Brief in Opposition at 19).

In fashioning this argument, respondents offer an extremely narrow and ultimately erroneous description of this Court's voting rights jurisprudence. This Court has entertained a great many constitutionally based cases involving rights of electoral participation that extend well beyond circumstances where minor party or independent candidates are being frozen out of the political process. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330; *Carrington v. Rash*, 380 U.S. 89; *Buckley v. Valeo*, 424 U.S. 1; *Tashjian*, 479 U.S. 208; *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214. Respondents' argument represents simply another effort to mischaracterize this controversy as a "ballot access" case and to ignore Burdick's claim that the constitutional right to vote entitles him to use the franchise to express his dissatisfaction with the candidates presented on the ballot.

Moreover, in fashioning this argument respondents also ignore one of the precipitating factors giving rise to this lawsuit. In the 1986 complaint filed in this case, Burdick asserted that, as of July 23, 1986 (the deadline for candidates to file nominating papers in that election year), only one candidate had filed to run for election to the State House of Representatives in the district in which Burdick lived; that Burdick had no desire to vote for that candidate; that, as the sole candidate who had filed for election in Burdick's state legislative district, this candidate would be deemed to be "automatically" elected to office under Hawaii law; that Burdick was, therefore, left without a candidate to vote for with respect to that state legislative race; and that Burdick wanted to complete a write-in ballot to vote against this candidate who was running unopposed. (Complaint, ¶7, set forth in Appellant's Excerpts of Record filed in the Ninth Circuit at 257).

These assertions make clear that, while Burdick did not identify any specific candidate for whom he would

wish to vote, he did identify a particular candidate against whom he wished to vote. Moreover, these assertions demonstrate the nature of the concrete injury sustained by petitioner as a result of Hawaii's prohibition against write-in voting. The 1986 state legislative election left Burdick with two unpalatable choices: he could either vote for the sole candidate appearing on the ballot or he could choose not to vote at all. Petitioner asserts that the First and Fourteenth Amendment to the federal Constitution guarantees him another choice: the right to vote against the only candidate appearing on the ballot in Burdick's state legislative district.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the previously filed petition, the petition for *certiorari* should be granted.

Respectfully submitted,

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Mary Blaine Johnston
90 Central Avenue
Wailuki, Maui, Hawaii 96793
(808) 244-8750

Alan B. Burdick
820 Mililani Street
Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

Dated: November 25, 1991

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALAN B. BURDICK,	)	C.A. NOS. 90-15873
	)	90-15876
Plaintiff-Appellee,	)	90-15877
)	
v.	)	D.C. NOS.
	)	CV-86-0582-HMF
MORRIS TAKUSHI, Director	)	CV-86-0365-HMF
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant	)	ON APPEAL FROM
Governor, State of Hawaii;	)	THE ORDER AND
BENJAMIN CAYETANO,	)	JUDGMENT OF THE
in his capacity as Lieutenant	)	DISTRICT COURT
Governor of the State of	)	FOR THE DISTRICT
Hawaii; MORRIS TAKUSHI,	)	OF HAWAII, CHIEF
Director of Elections	)	UNITED STATES
of the State of Hawaii,	)	DISTRICT JUDGE
	)	HAROLD M. FONG
Defendants-Appellants.	)	PRESIDING
)	

**MOTION FOR EXTENSION OF TIME TO FILE
PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC**

AFFIDAVIT OF MARY BLAINE JOHNSTON

CERTIFICATE OF SERVICE

MARY BLAINE JOHNSTON
90 Central Avenue
Wailuku, Maui, Hawaii 96793
Telephone: (808) 244-8750

ALAN B. BURDICK, Pro Se
702 Hasegawa Komuten Building
Honolulu, Hawaii 96813
Telephone: (808) 537-5300

Of Counsel:
American Civil Liberties Union of
Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
Telephone: (808) 545-1722

Attorneys for PLAINTIFF-APPELLEE

**PLAINTIFF-APPELLEE'S MOTION FOR EXTENSION
OF TIME TO FILE PETITION FOR REHEARING
WITH SUGGESTION WITH REHEARING EN BANC**

Plaintiff-Appellee Alan Burdick through his counsel undersigned, hereby moves this Court for an Order Extending the Time within which Plaintiff-Appellee may file his Petition for Rehearing with Suggestion for Rehearing En Banc, of the Court's decision entered herein on March 1, 1991 from 14 days to 21 days.

This Motion is made pursuant to Federal Rules of Appellate Procedures 26, 27, and 40 and Ninth Circuit Rule 27-1 and is based on the Affidavit of Counsel attached hereto.

Dated: Wailuku, Maui, Hawaii, March 21, 1991

/s/
MARY BLAINE JOHNSTON
Attorney for Plaintiff-Appellee,
Burdick

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALAN B. BURDICK,	)	C.A. NOS. 90-15873
	)	90-15876
Plaintiff-Appellee,	)	90-15877
)	
v.	)	D.C. NOS.
	)	CV-86-0582-HMF
MORRIS TAKUSHI, Director	)	CV-86-0365-HMF
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant	)	ON APPEAL FROM
Governor, State of Hawaii;	)	THE ORDER AND
BENJAMIN CAYETANO,	)	JUDGMENT OF THE
in his capacity as Lieutenant	)	DISTRICT COURT
Governor of the State of	)	FOR THE DISTRICT
Hawaii; MORRIS TAKUSHI,	)	OF HAWAII, CHIEF
Director of Elections	)	UNITED STATES
of the State of Hawaii,	)	DISTRICT JUDGE
	)	HAROLD M. FONG
Defendants-Appellants.	)	PRESIDING
)	

**PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC**

CERTIFICATE OF SERVICE

MARY BLAINE JOHNSTON
90 Central Avenue
Wailuku, Maui, Hawaii 96793
Telephone: (808) 244-8750

ALAN B. BURDICK, Pro Se
702 Hasegawa Komuten Building
Honolulu, Hawaii 96813
Telephone: (808) 537-5300

Of Counsel:

American Civil Liberties Union of
Hawaii Foundation

212 Merchant Street, Suite 300

Honolulu, Hawaii 96813

Telephone: (808) 545-1722

Attorneys for PLAINTIFF-APPELLEE

2

No. 91-535

Supreme Court, U.S.
FILED
NOV 1 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

ALAN B. BURDICK,

Petitioner,

v.

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE; Lieutenant Governor of Hawaii,
BENJAMIN CAYETANO, in his capacity as Lieutenant
Governor of the State of Hawaii,

Respondents.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF EUGENE McCARTHY, DR. BENJAMIN
SPOCK, JOHN G. SCHMITZ, SONIA JOHNSON,
LIBERTARIAN PARTY NATIONAL COMMITTEE,
LIBERTARIAN PARTY OF HAWAII, SOCIALIST
WORKERS PARTY, AMERICAN PARTY,
PROHIBITION PARTY, SOCIALIST PARTY,
TED ERUM, MARIA HUSTACE, AND THE
COALITION FOR FREE AND OPEN ELECTIONS AS
AMICI CURIAE IN SUPPORT OF THE PETITION

JAMES C. LINGER
1710 S. Boston Ave.
Tulsa, OK 74119
(918) 585-2797

Counsel for Amici Curiae

CONSENT TO FILING BRIEF AMICI CURIAE

All parties to the instan' cause have consented to the filing of this brief of the Amici Curiae as evidenced by the filing of the Consent to Filing of Brief Amici Curiae herein.

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
A. HAWAII BALLOT ACCESS FOR INDEPENDENT CANDIDATES (FOR OFFICE OTHER THAN PRESIDENT) IS EXTRAORDINARILY SEVERE.....	5
B. HAWAII BALLOT ACCESS REQUIREMENTS FOR NEW PARTIES ARE ALSO SEVERE.....	7
C. HAWAII BALLOT ACCESS REQUIREMENTS FOR INDEPENDENT CANDIDATES FOR PRESIDENT ARE NOT AS SEVERE AS THE LAWS FOR NEW PARTIES AND FOR OTHER INDEPENDENT CANDIDATES, BUT THEY ARE NOT EASY AND HAVE PREVENTED CANDIDATES WITH CONSIDERABLE SUPPORT FROM QUALIFYING	8
D. CONCLUSION	11
APPENDIX A (BALLOT ACCESS FOR STATE-WIDE INDEPENDENT CANDIDATES OTHER THAN PRESIDENT)	App. 1
APPENDIX B (DEADLINES FOR NEW PARTIES TO QUALIFY FOR THE BALLOT)	App. 4

TABLE OF AUTHORITIES

	Page
CASES:	
<i>American Party v. State of New York</i> , 409 U.S. 909, and 1021 (1972)	2
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	10
<i>Dixon v. Maryland State Administrative Board of Election Laws</i> , 878 F.2d 776 (4th Cir. 1989).....	3
<i>Erum v. Cayetano</i> , 881 F.2d 689 (9th Cir. 1989)	1, 5
<i>Grogan v. Graves</i> , unreported, case no. 90-2378-O (D. Kan., 1990)	11
<i>Hustace v. Doi</i> , 588 P.2d 915 (Hi., 1978).....	1, 5
<i>Kamins v. Board of Elections of the District of Columbia</i> , 324 A.2d 187 (D.C., 1974).....	11
<i>Libertarian Party of Hawaii v. Waihee</i> , unreported, case no. 11435 (Hi., 1986).....	7
<i>Libertarian Party of Hawaii v. Waihee</i> , unreported, civil no. 86-0439 (D. Hi., 1986).....	2, 7
<i>Munn v. Michigan Secretary of State</i> , unreported, case no. 51041 (Mich., 1964)	2, 10
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	5
<i>Paul v. State of Indiana Election Board</i> , 743 F.Supp. 616 (S.D. Ind., 1990).....	2, 11
<i>People's Party v. Ariyoshi</i> , unreported, civil no. 72-3620 (D. Hi., 1973)	2
<i>Saul v. State Board of Elections</i> , unreported, civil no. 76-0494-R (E.D. Va., 1976).....	3

TABLE OF AUTHORITIES – Continued

	Page
<i>Socialist Labor Party v. Rhodes</i> , 290 F.Supp. 983 (S.D. Ohio, 1968)	11
<i>Williams v. Rhodes</i> , 290 F.Supp. 983 (S.D. Ohio, 1968).....	2
STATUTES:	
Ariz. Rev. Stat. 16-312	9
Ark. Stat. Ann. 7-5-205	9
Cal. Elec. Code 7300ff	9
Colo. Rev. Stat. 1-4-1001	9
Ct. Gen. Stat. Ann. 9-175	9
Fla. Stat. Ann. 99.061(3).....	9
Ga. Code Ann. 21-2-133.....	9
Hi. Rev. Stat. 11-62(a)(1)	4, 7
Hi. Rev. Stat. 11-62(d)	7
Hi. Rev. Stat. 11-113(c)(2)(B)	8
Hi. Rev. Stat. 12-5	5
Hi. Rev. Stat. 12-31	5
Hi. Rev. Stat. 12-41(b).....	4, 5, 6
Idaho Code 34-702A	9
Ill. Ann. Stat. Ch. 46, sec. 17-16.1	9
Ind. Code Ann. 3-8-2-2.5.....	9
Md. Ann. Code art. 33, sec. 17-5(b)	9
Mass. Gen. Laws Ann. ch. 54, sec. 78A	9

TABLE OF AUTHORITIES – Continued

	Page
Mo. Ann. Stat. 115.453(4)	9
Mont. Code Ann. 13-10-211	9
Nebr. Rev. Stat. 32-428.10(2).....	9
N.M. Stat. Ann. 1-12-19.1A.....	9
N.Y. Elec. Laws 6-153.....	9
N.C. Gen. Stat. 163-123(a).....	9
N.D. Century Code 16.1-12-02.2	9
Ohio Rev. Code 3513.041.....	9
Ore. Rev. Stat. 249.007	9
Tex. Elec. Code Ann. 192.036	9
Utah Code Ann. 20-7-20, 2nd par.....	9
Wash. Rev. Code 29.04.180	10
Wis. Stat. Ann. 8.185(1).....	10
OTHER AUTHORITIES:	
<i>Result of Votes Cast</i> , by Hawaii Lieutenant Governor	8
<i>Statement of Votes</i> , Nov. 1976, by California Secretary of State.....	10
<i>Statistics of the Presidential Election</i> , by Clerk of the U.S. House of Representatives	9

INTEREST OF THE AMICI

All amici have, or have had, a direct stake in the outcome of whether or not write-in votes will be permitted in Hawaii and throughout the United States, since all amici except the Coalition for Free & Open Elections have at times been desirous of receiving votes in Hawaii, have not been able to qualify for the ballot in Hawaii, and have not even been able to obtain write-in votes there.

Hawaii does not permit write-in votes. In addition, Hawaii has severe restrictions on ballot access at the general election for new political parties and independent candidates. This unhappy combination has meant that amici (political parties or candidates for office in past elections) have neither been able to appear on the ballot in Hawaii (or, in the case of the Libertarian Party of Hawaii, would not have been able to appear without litigation), nor to receive write-in votes in that state.

Amici Ted Erum and Maria Hustace were independent candidates for Hawaii state office who tried and failed to qualify for the general election ballot. Each brought lawsuits to overturn the ballot access restrictions that kept them from being on the general election ballot, but did not succeed.¹

Amici Benjamin Spock, John G. Schmitz, and Libertarian Party of Hawaii each desired to appear on the Hawaii general election ballot but were unable to qualify. Each brought a lawsuit against Hawaii ballot access restrictions. The lawsuit brought by Benjamin Spock won,

¹ Hustace v. Doi, 588 P.2d 915 (Hi., 1978); Erum v. Cayetano, 881 F.2d 689 (9th Cir. 1989).

but not until after the election at which Spock desired to be on the ballot.² The lawsuit brought by John G. Schmitz was not won.³ The lawsuit brought by the Libertarian Party of Hawaii⁴ resulted in an injunction to put the party on the 1986 general election ballot, but no declaratory relief against the problems complained of was ever obtained, and one of the problems complained of (the early deadline for new parties to qualify) still exists in Hawaii law.

Amici Libertarian Party⁵, American Party⁶ and Prohibition Party⁷ have all successfully litigated in other states to obtain the right to receive write-in votes for their presidential candidates. Amicus Socialist Workers Party successfully litigated in another state to receive write-in votes for candidates other than the party's presidential

² *People's Party v. Ariyoshi*, unreported Findings of Fact and Conclusions of Law of July 10, 1973, civil case no. 72-3620 (D. Hi., 1973).

³ *American Party v. State of New York*, 409 U.S. 909 and 1021 (1972), a case in which the American Party applied to the U.S. Supreme Court for an injunction to print its presidential candidate on the ballot of all states in which he had not qualified, including Hawaii.

⁴ *Libertarian Party of Hawaii v. Waihee*, unreported Order Granting an Injunction of July 21, 1986, civil case no. 86-0439 (D. Hi., 1986).

⁵ *Paul v. State of Indiana Election Board*, 743 F.Supp. 616 (S.D. Ind., Indianapolis Div., 1990).

⁶ *Williams v. Rhodes*, 290 F.Supp. 983 (S.D. Ohio, 1968).

⁷ *Munn v. Michigan Secretary of State*, unreported, case no. 51041 (Mich., Oct. 21, 1964).

candidate⁸. Amicus Socialist Party successfully lobbied for legislation in another state (California) to allow valid write-in votes for presidential candidates. All of these amici political parties have nominated presidential candidates for 1992, or will do so soon. Amicus Eugene McCarthy has never directly litigated for the right to obtain write-in votes, but supporters of his 1976 independent presidential candidate litigated for the right to cast write-in votes for him in another state (Virginia) that year, and McCarthy supported such lawsuit.⁹ Sonia Johnson never litigated the right to cast write-in votes, but as the presidential candidate of the Citizens Party in 1984 she desired to receive votes in Hawaii and was unable to, due to her failure to qualify for the Hawaii ballot and the failure of Hawaii to permit write-in voting.

Amicus Coalition for Free & Open Elections (COFOE) is an unincorporated association of organizations and individuals, formed in 1985, to work for full and fair access to the electoral process.

I. SUMMARY OF ARGUMENT

The Ninth Circuit upheld Hawaii's ban on write-in voting partly because Hawaii seemed to that Court to have easy ballot access requirements. The purpose of amici's brief is to make this Court aware that the Ninth

⁸ *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989).

⁹ *Saul v. State Board of Elections*, unreported, civil case no. 76-0494-R (E.D. Va., Oct. 28, 1976).

Circuit's analysis of Hawaii ballot access laws was factually incomplete, and as a result the decision was wrong.

The Ninth Circuit stated in its opinion, at page 419, "Hawaii election laws provide candidates with considerable ease of access to the ballot. If Burdick desires to vote for a particular candidate, that candidate need only be qualified for the office being sought and demonstrate a minimal amount of support to be placed on the ballot". This statement is supported by footnote 2, which states that individual candidates need 15 or 25 signatures to be placed on the primary election ballot, and that new parties also have easy ballot access, namely signatures equal to 1% of total registered state voters.

The Ninth Circuit failed to mention that independent candidate access to the Hawaii general election ballot (for office other than president) requires 10% support, from the ranks of voters who abstain from voting in a partisan primary. Hawaii Revised Statutes, sec. 12-41(b). There is an exception to this rule; the independent can also qualify if he or she outpolls a partisan primary winner. The Ninth Circuit also failed to mention that new political parties must submit their petitions 150 days prior to the date of the primary. Hawaii Revised Statutes, sec. 11-62(a)(1). On both points, Hawaii ballot access laws are the most severe in the nation.¹⁰

¹⁰ See Appendix at the back of this document.

II. ARGUMENT

A. Hawaii Ballot Access for Independent Candidates (for office other than president) is extraordinarily severe.

Ballot access to the general election for Hawaii independent candidates (for office other than president) is extraordinarily severe. Hawaii Revised Statutes, sections 12-5 and 12-41(b), provide that independent candidates must first run in the primary. All states have procedures for independent candidates to qualify for a place on the general election ballot. Hawaii and Washington are the only states in which an independent candidate must run in the primary election and must poll a certain number of votes in the primary, in order to advance to the general election ballot. Washington state procedures were upheld by this Court in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Hawaii procedures were upheld by the Hawaii Supreme Court in *Hustace v. Doi*, 60 Haw. 282, 588 P.2d 915 (1978) and by the Ninth Circuit in *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). Hawaii procedures, unlike Washington procedures, require a 10% vote in the primary (by contrast, Washington state only requires 1%). In addition, Washington has a "blanket" primary, where a primary voter is free to vote for an independent candidate for one office, a Republican for a different office, and a Democrat for still a different office. *Munro* at 192. By contrast, Hawaii has an "open" primary, at which a voter is free to vote in the primary of any qualified party, or to vote in the non-partisan primary. However, once the primary voter has chosen, he or she is confined to casting all primary votes in that particular primary Sec. 12-31. Therefore, a primary voter who chooses a non-partisan

ballot (which is the only way to vote for an independent candidate) is unable to vote for any partisan candidate for any office.

The Hawaii 10% requirement, in combination with the requirement that voters who support an independent candidate lose the opportunity to vote in a partisan primary, is so severe, that no independent candidate has ever met the requirement. However, sec. 12-41(b) provides a "loophole": an independent who, at the primary election, outpolls a winner of a partisan primary may also advance to the general election ballot. Since statehood, ten independent candidates have qualified for the general election ballot under this "loophole"¹¹. All ten qualified by outpolling a primary winner of a minor party primary. Since typically fewer than one-tenth of 1% of primary voters ever choose to vote on a minor party primary, it is fairly easy for an independent candidate to outpoll the winner of a minor party primary. Generally, though, there are no minor party primary candidates for most offices, so usually the loophole is not available.

No state other than Hawaii requires a showing of support, for an independent candidate to qualify for the

¹¹ The independents who qualified under the "loophole" were James Kimmel for U.S. Senate in 1976, James Abraham for Maui Council in 1976, Leota/Taylor for Governor/Lt. Gov. in 1978, Maria Hustace for Maui Council in 1980, William Leialoha for Honolulu Mayor in 1980, Greg Mills for Congress in 1982, Wade Christensen for Honolulu Council in 1982, Ross/Kimmel for Governor/Lt. Gov. in 1990, David Crowley for Hawaii Mayor in 1990, and Richard Akuna for Maui Mayor in 1990. Note that no independent candidate for the state legislature has ever qualified for the general election ballot.

general election ballot, greater than 5% of the electorate. See Appendix A.

B. Hawaii Ballot Access Requirements for New Parties are also Severe.

Hawaii requires that new political parties submit a petition signed by 1% of the number of registered voters as of the last general election. The petition is due 150 days before the primary. Sec. 11-62(a)(1). The Ninth Circuit characterized the 1% requirement as "easy" and did not mention the deadline. However, the 150 day advance time is the most severe deadline of any of the 50 states, for new party qualification for the ballot. No other state requires the petitions to be submitted earlier than 135 days before the primary (see Appendix B).

In 1986, the Libertarian Party of Hawaii attempted to qualify as a "new" political party, but had not collected a sufficient number of signatures by the deadline. The party filed a lawsuit, alleging the early deadline was unconstitutional, in the Hawaii Supreme Court. However, on June 10, 1986, that court refused to hear the case. *Libertarian Party of Hawaii v. Waihee*, no. 11435. The party then filed a lawsuit in U.S. District court, and won an injunction permitting it to collect signatures beyond the deadline. *Libertarian Party of Hawaii v. Waihee*, Civil no. 86-0439. The party then qualified for the ballot and has retained ballot status since under a law passed in 1986 which permits any party which has been on the ballot for three elections in a row, to be on the ballot for an additional ten years. Sec. 11-62(d). However, the Legislature

has not modified the 150 day before the primary provision, and no new party has succeeded in petitioning within that deadline since 1978. According to *Results of Votes Cast* for all election years 1980 through 1990, published by the Lieutenant Governor of Hawaii, no political parties other than the Democratic, Republican and Libertarian Parties participated in Hawaii elections during that period.

C. Hawaii Ballot Access Requirements for Independent Candidates for President are not as Severe as the laws for New Parties and for Other Independent Candidates, but they are not easy and have prevented Candidates with Considerable Support from qualifying.

Hawaii requires independent presidential candidates to qualify by submitting a petition signed by 1% of the last vote cast. Sec. 11-113(c)(2)(B). The petition is not due until 50 days prior to the general election. Although this is not a draconian requirement, it now requires over 4,000 valid signatures and is difficult enough to have prevented several third party or independent presidential candidates from appearing on the ballot in Hawaii, even though they had significant support and had qualified in many other states. Examples include former Congressman John G. Schmitz, 1972 American Party candidate; Benjamin Spock, 1972 Peoples Party candidate; former Senator Eugene McCarthy, 1976 independent presidential candidate; and Sonia Johnson, 1984 Citizens Party candidate.

Third party and independent presidential candidates depend on their ability to receive write-in votes, in order

to carry out a viable national campaign. This is because it is extremely rare for a third party or independent presidential candidate to appear on the ballot in all jurisdictions. Since 1916, there have been only three such candidates who appeared on the ballot in all jurisdictions (John B. Anderson and Ed Clark in 1980, and Lenora Fulani in 1988). Even George Wallace in 1968 failed to qualify in the District of Columbia.¹²

In 1951, California became the first state to formalize a procedure for the casting of valid write-in votes for president at the general election. Now codified in California Election Code 7310, the law provides that a write-in candidate for president at the general election must file a declaration of write-in candidacy and must submit a slate of presidential elector candidates who are pledged to him or her. A write-in vote for the presidential candidate is deemed to be a vote for that slate of candidates for elector. The law was suggested by the Socialist Party and has been enacted in over half the states¹³. Write-in votes

¹² See *Statistics of the Presidential Election of (year)* published by the Clerk of the U.S. House of Representatives for each election since 1912.

¹³ See Ariz.Rev.Stat. 16-312, Ark.Stat.Ann. 7-5-205, Cal.Elec.Code 7300ff, Colo.Rev.Stat. 1-4-1001, Ct. Gen.Stat.Ann. 9-175, Fla.Stat.Ann. 99.061(3), Ga.Code Ann. 21-2-133, Id. Code 34-702A, Ill.Ann.Stat. Ch. 46, sec. 17-16.1, Ind.Code Ann. 3-8-2-2.5, Md.Ann.Code art. 33, sec. 17-5(b), Mass.Gen.Laws Ann. Ch. 54, sec. 78a, Mo.Ann.Stat. 115.453(4), Mont.Code Ann. 13-10-211, Nebr.Rev.Stat. 32-428.10(2), N.M.Stat.Ann. 1-12-19.1A, N.Y.Elec.Law 6-153, N.C.Gen.Stat. 163-123(a), N.D. Century Code 16.1-12-02.2, Ohio Rev.Code 3513.041, Ore.Rev.Stat. 249.007, Tex.Elec.Code Ann. 192.036, Utah Code

(Continued on following page)

for president are sometimes cast in significant numbers. For example, independent presidential candidate Eugene McCarthy, who was not on the ballot in California, received 58,412 write-in votes for president in that state.¹⁴

Although the Ninth Circuit decision did not mention write-in votes for president, the decision is so sweeping that there is little doubt that the decision upholds a ban on write-in votes for president as well as for other office. However, even if a state had a genuine interest in banning write-in votes for other office, there is little justification for any one state to ban write-in votes for president. A ban on write-in votes for president threatens the right of a third party or independent presidential candidate to be able to receive votes in all states, since it is so rare that such a candidate qualifies for the ballot in every state. *Anderson v. Celebrezze*, 460 U.S. 780 at 795 (1983), held that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries."

Other courts have upheld the right of a voter to cast a write-in vote for president at the general election. In *Munn v. Michigan Secretary of State*, unreported, Case no.

(Continued from previous page)

Ann. 20-7-20, 2nd par., Wash.Rev.Code 29.04.180, Wis.Stat. Ann. 8.185(1). In addition, Michigan follows the 1964 order of its Supreme Court and tallies write-ins for presidential candidates who request such a tally, although there is no law or regulation on the subject.

¹⁴ See *Statement of Votes*, Nov. 1976, published by the California Secretary of State.

51041 (MI, Oct. 21, 1964), the Michigan Supreme Court ordered the Secretary of State to permit and count write-in votes cast for the Prohibition Party presidential candidate. In *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983 (S.D. Ohio, 1968) a 3-judge court ordered the Ohio Secretary of State to permit and count write-in votes for all general election presidential candidates who filed a slate of electors pledged to vote for him or her in the electoral college. In *Kamins v. Board of Elections of the District of Columbia*, 324 A.2d 187 (1974), filed by voters who wished to vote for Dr. Benjamin Spock, Peoples Party 1972 presidential candidate, the District of Columbia Court of Appeals ordered the Board of Elections to permit and count write-in votes for president at the general election. In *Paul v. Indiana State Board of Elections*, 743 F.Supp. 616 (S.D. Ind., 1990), filed by voters who wished to vote for Dr. Ron Paul, Libertarian Party 1988 presidential candidate, the U.S. District Court ordered the State Board of Elections to permit and count write-in votes for president and other office. In *Grogan v. Graves*, unreported, case no. 90-2378-0 (D. Kan., 1990), the U.S. District Court ordered the Kansas Secretary of State to permit and count write-ins for President as well as for Governor.

III. CONCLUSION

This Court should grant Burdick's Petition for a Writ of Certiorari. Alternatively, if this Court feels that the Ninth Circuit decision did not accurately analyze all of the Hawaii ballot access laws, and that the issue of a ban on write-in votes is dependent on an analysis of the

state's ballot access laws, then this Court should remand the case.

Respectfully submitted,

JAMES C. LINGER
1710 S. Boston Ave.
Tulsa, OK 74119
(918) 585-2797

Counsel for Amici Curiae

APPENDIX A

BALLOT ACCESS FOR STATEWIDE INDEPENDENT CANDIDATES OTHER THAN PRESIDENT

STATE	LEGAL REQUIREMENT	CODE REFERENCE
Ala	1% of number of registered voters	17-7-1(a)(3)
Alas	1% of last vote cast	15.25.160
Az	1% of last vote cast	16.341E
Ark	10,000 signatures	7-7-103(c)(2)
Cal	1% of number of registered voters	elec. code 6831
Colo	1,000 signatures	1-4-801
Ct	1% of last vote cast	9-453(d)
Del	1% of number of registered voters	Title 15, sec 3002
Fla	3% of number of registered voters	99.096
Ga	1% of number of registered voters	21-2-170(b)
Hi	10% of vote cast in primary	Tit. 2, 12-6 & 12-41
Id	1,000 signatures	34-708
Il	25,000 signatures	Ch. 46, sec. 10-3
In	2% of last secretary of state vote	3-8-6-3
Io	1,000 signatures	Title 4, sec. 45.1
Kan	5,000 signatures	25-303
Ky	5,000 signatures	Title 10, sec. 118.315
La	just pay \$600; no petition needed	Title 18, sec. 465
Me	4,000 signatures	Title 21, sec. 494.5
Md	3% of number of registered voters	Art. 33, sec. 4B-1
Ma	1/2 of 1% of last gubernatorial vote	Chap. 53, sec. 6

App. 2

Mi	1% of last gubernatorial vote	168.590(b)2
Mn	2,000 signatures	204B.08
Ms	1,000 signatures	23-15-359
Mo	1% of last gubernatorial vote	Title 9, sec. 115.321
Mt	5% of 1988 gub. winner's vote	13-10-502
Neb	2,500 signatures	32-504(2)(c)
Nev	3% of last congress vote	Title 24, sec. 293.200.2(c)
N H	3,000 signatures	Title 4, sec. 655:42
N J	800 signatures	19:13-5
N M	3% of last gubernatorial vote	1-8-51, amended 1991
N Y	20,000 signatures	Chap. 17, sec. 6-142
N C	2% of number of registered voters	163-122
N D	1,000 signatures	16.1-11-30
Oh	5,000 signatures	3513.257
Ok	just pay \$1000; no petition needed	Tit. 26, 5-112 & 6-106
Ore	1,000 convention attendees	Title 23, sec. 249.735
Pa	2% of highest winner vote, last election	Title 25, sec. 2911
R I	1,000 signatures	17-14-7
S C	10,000 signatures	7-11-70
S D	1% of last gubernatorial vote	12-7-1
Tn	25 signatures	2-505
Tx	1% of last gubernatorial vote	Elec. code 142.007
Ut	300 signatures	20-3-38
Vt	1,000 signatures	Title 17, sec. 2402(b)

App. 3

Va	1/2 of 1% of number of reg. voters	24.1-168
Wa	1% of vote cast in primary	29.18.110
W Va	1% of last vote cast	3-5-23
Wis	2,000 signatures	Title 2, sec. 8.20(4)
Wy	5% of last congress vote	22-4-402(d)
DC	1% of number of registered voters	1-1312(j)(1)

This chart shows the legal requirements to qualify a state-wide independent candidate for the general election ballot (for office other than president). All requirements are signatures on a petition, except for Louisiana and Oklahoma (filing fees only) and Hawaii and Washington (where the requirements are minimum votes an independent must poll in the primary).

APPENDIX B

DEADLINES FOR NEW PARTIES TO
QUALIFY FOR THE BALLOT

STATE	LEGAL REQUIREMENT	CODE REFERENCE
Ala	undetermined; see <i>NAP v. Hand</i>	933 F.2d 1568 (1991)
Alas	primary day; see <i>Sykes v. Lt. Gov.</i>	1991 Lt. Gov. ruling
Az	115 days before primary	16.803B
Ark	first Tues. in May (primary is in May)	7-1-101(1)(B)
Cal	135 days before primary	elec. code 6430
Colo	1 week before primary	1-4-801e & h
Ct	32 days before primary	9-405 & 9-453i
Del	21 days before primary	Title 15, sec. 3001
Fla	49 days before primary	99.096
Ga	second Tues. in July (primary in Sept.)	21-2-187
Hi	150 days before primary	Tit. 2, 11-62(a)(1)
Id	August 31 (primary is in May)	34-501(c)(D)
Il	92 days before general election	Ch. 46, sec. 10-6
Ind	July 15 (primary is in May)	3-8-6-10
Io	81 days before general election	Title 4, sec. 44.4

Kan	111 to 117 days before primary	25-302a, 303, 205
Ky	undetermined; see <i>Libt Pty v. Ehrler</i>	Sep. 1991 fed. ct. ruling
La	statute does not indicate a deadline	Title 18, sec. 441
Me	primary day	Title 21, sec. 354.8
Md	first Monday in August	Art. 33, sec. 7-1(c)
Ma	14 weeks before general election	Chap. 53, sec. 7
Mich	110 days before general election	168.685
Mn	primary day	204B.09
Ms	statute does not indicate a deadline	23-15-1051
Mo	first Monday in August	Title 9, sec. 115.329
Mt	82 days before primary	13-10-601
Neb	August 1 (primary is in May)	32-526
Nev	65 days before 2nd Fri. in August	Sec. 293.1715.2(c)
N H	34 days before primary	Title 4, sec. 655:43
N J	54 days before primary	19:13-9
N M	second Tues. in July (primary is in June)	1-7-4,1-8-2,1-15-3
N Y	11 weeks before general election	Chap. 17, sec. 6-158.9
N C	2nd Thursday in July	Bd. Elec ruling 9/16/91
N D	60 days before primary	16.1-11-30

App. 6

Oh	120 days before primary	3517.01
Ok	May 31 (primary is in August)	Tit. 26, 1-108.2
Ore	70 days before general electio	Title 23, sec. 249.722
Pa	August 1 (fed ct ruling, <i>Libt Pty v. Davis</i>)	unreported 1984 case
R I	54 days before primary	17-14-12
S C	six months before general election	7-9-10
S D	first Tuesday in April (primary in June)	12-5-1
Tn	statute does not indicate a deadline	2-13-107
Tx	75 days after first primary	Elec. code 181.005
Ut	April 15 (primary is first week in Sep.)	20-3-38
Vt	47 days before general election	Title 17, sec. 2386
Va	second Tues. in June	24.1-166 & 168
Wa	Sat. bef. last Monday in July	29.24.020, 29.18.030
W Va	day before primary	3-5-24
Wis	June 1	Title 2, sec. 5.62(2)
Wy	May 1 (primary is in August)	22-4-402(d)
DC	69 days before general election	1-1312(j)

App. 7

This chart shows the deadline for a new party to qualify for the ballot. In some states, the deadline for a new party to qualify for the purpose of running a presidential candidate, is different than the deadline to qualify for other office. In such states, this chart shows the non-presidential deadline. Maine has two procedures to qualify a new party for any office; the later one is shown.

JAN 23 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Gov-
ernor of Hawaii; BENJAMIN
CAYETANO, in his capacity
as Lieutenant Governor of
the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX
VOLUME I OF II (pages 1-214)

Warren Price, III
Attorney General
State of Hawaii

Steven S. Michaels
(Counsel of Record)
Deputy Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

Counsel for Respondents

Arthur N. Eisenberg
(Counsel of Record)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Counsel for Petitioner

TABLE OF CONTENTS*

Page

VOLUME I

Relevant Docket Entries	1
United States District Court	1
Supreme Court of Hawaii	11
United States Court of Appeals	12
Complaint for Declaratory and Injunctive Relief (No. 86-582), dated Aug. 21, 1986	31
Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief (No. 86-582), dated Sept. 10, 1986	37
<i>including</i> Affidavit of Alan B. Burdick, dated Sept. 9, 1986	38
and [Proposed] Order Granting Motion for Summary Judgment, and for Preliminary and Permanent Injunctive Relief, undated	50
Answer (No. 86-582), dated Sept. 15, 1986	53
Affidavit of Dwayne D. Yoshina, dated Sept. 19, 1986	56
Opinion and Order of the District Court (No. 86-582), dated Sept. 29, 1986	*

* Entries marked with an asterisk (*) are included in the appendix to the petition for *certiorari*.

	<i>Page</i>
Judgment of the District Court (No. 86-582), dated Sept. 30, 1986	59
Notice of Appeal (No. 86-582), dated Sept. 30, 1986	60
Motion for Stay, Suspension or Modification of Injunction, dated Oct. 3, 1986	61
<i>including</i> Affidavit of Dwayne D. Yoshina, dated Oct. 3, 1986	62
Order Denying Motion for Stay, Suspension, or Modification of Injunction, dated Oct. 8, 1986	76
Notice of Appeal (No. 86-582), dated Oct. 8, 1986	108
Order of the Court of Appeals granting emergency stay, dated Oct. 15, 1986	109
Opinion of the Court of Appeals, dated May 17, 1988	*
Judgment of the Court of Appeals, dated May 17, 1988	110
Complaint for Declaratory and Injunctive Relief (No. 88-365), dated May 17, 1988	111
Answer (No. 88-365), dated June 7, 1988	124
Order Certifying Questions of Hawaii Law to the Supreme Court of the State of Hawaii, dated July 19, 1988	131
and	

	<i>Page</i>
Certified Questions from the United States District Court for the District of Hawaii to the Supreme Court of the State of Hawaii	133
Amended Certification from the District Court to the Hawaii Supreme Court, dated Aug. 9, 1988	*
Order Denying Motion for Amendment of Certification Order, dated Aug. 25, 1988	136
District Court Order Consolidating Cases, dated Nov. 21, 1988	142
Opinion of the Hawaii Supreme Court, July 21, 1989	*
Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief, dated Feb. 8, 1990	143
<i>including</i> Affidavit of Alan B. Burdick, dated Feb. 5, 1990	144
and [Proposed Order] Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief, undated	147
Defendant's Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay, dated April 19, 1990	150
<i>including</i> Declaration of Dwayne Yoshina, dated April 19, 1990	152
and Deposition of Alan B. Burdick, dated Aug. 26, 1988	155

Page

and Portions of Plaintiff's Brief to the Hawaii Supreme Court, dated Dec. 2, 1988 (as exhibits)	196
Opinion and Order of the District Court, dated May 10, 1990	*
Judgment of the District Court, dated May 15, 1990	204
Notice of Appeal, dated June 6, 1990	205
Notice of Appeal, dated June 12, 1990	207
Notice of Appeal, dated June 12, 1990	209
Order of the Court of Appeals Consolidating Appeals, dated July 23, 1990	211
Opinion of the Court of Appeals, dated March 1, 1991 (subsequently withdrawn)	*
Order and Opinion of the Court of Appeals, dated June 28, 1991	*
Mandate, dated June 28, 1991	213

VOLUME II

Hawaii General Election Results	215
---	-----

RELEVANT DOCKET ENTRIES

BURDICK v. TAKUSHI, et al.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

Docket No. 86-582 - CONSOLIDATED WITH 88-00365

DATE	NR	PROCEEDINGS
1986		
Aug. 21	1	Complaint for Declaratory and Injunctive Relief; Exhibit 1; Summons Summons Issued
Sep. 11	6	Notice of Hearing of Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Memorandum in Support of Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Affidavit of Alan B. Burdick; Exhibits 1-3; Proposed Order
15	7	Answer to Complaint for Declaratory and Injunctive Relief
22	8	Memorandum in Opposition to Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief; Affidavit of Dwayne D. Yoshina on behalf of defts
25	9	Plaintiff's Memorandum in Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment and Permanent Injunctive Relief
29	10	Order Granting Motion for Summary

Judgment and for Permanent Injunction - Plaintiff's Motion for Summary Judgment is granted. It is further ordered that the Motion for a Permanent Injunction be granted. Also the Defendants are to comply with this order by causing ballots for the November 1986 general election to provide for the casting of write in votes equal to the total number of candidates to be elected in each electoral contest, and that the Defendants provide for the counting, recording, and tabulation of such write in votes

30	11	Judgment in a Civil Case - Summary Judgment is entered in favor of Plaintiff and against Defendants. It is further Ordered that the Motion for a Permanent Injunction is granted
30	12	Notice of Appeal (By Defendants)
Oct 3	13	Notice of Motion for Stay, Suspension, or Modification of Injunction; Motion for Stay, Suspension or Modification of Injunction; Affidavit of Dwayne D. Yoshina, Exhibits "A" - "D"; Affidavit of Steven S. Michaels, Exhibits "A" - "C"
6	15	Memorandum in Opposition to Motion for Stay, Suspension, or Modification of Injunction; Affidavit of Alan B. Burdick
	16	Reply Memorandum in Support of Motion for Stay, Suspension, or Modification of Injunction on behalf of depts
7	18	Affidavit of Thomas Yamashiro - on behalf of deft

	19	Deft's Motion for Stay, Suspension or Modification of Injunction - Arguments - Motion submitted
8	20	Order Denying Motion for Stay, Suspension, or Modification of Injunction
9	21	Notice of Appeal
20	22	Order from 9th CCA - appellant's emergency motion for stay of the district court's injunction pending appeal is granted
1987		
Mar 11	24	Designation of Clerk's Record on Appeal-On Behalf of Defendants Takushi/Waihee
1988		
June 13	26	Judgment from 9th CCA - Vacated & Remanded with instructions On 5-17-88
July 6	27	Stipulation Requesting the United States District Court for the District of Hawaii to Submit Certified Questions to the Supreme Court of the State of Hawaii; Exhibit A - referred to Fong
	19 28	Order Certifying Questions of Hawaii Law to the Supreme Court of the State of Hawaii
Aug 1	29	Notice of Motion; Motion for Amendment of Certification Order; Memorandum in Support of Motion for Amendment of Certification Order; Declaration of Counsel; On Behalf of Defendants; Proposed Order
	4 30	Corrections to Motion for Amendment to Certification Order and to Proposed

Order; On Behalf of Defendants

- 31 Supplemental Declaration of Counsel and Exhibits; On Behalf of Defendants
- 5 32 Defendants' Supplemental Exhibits (Briefs in the Court of Appeals) in Support of Motion for Amendment of Certification Order; Declaration of Counsel and Exhibits "A" - "C"
- 11 33 Memorandum in Opposition to Motion for Amendment of Certification Order; On Behalf of Plaintiff
- 19 34 Reply Memorandum in Support of Motion for Amendment of Certification Order; Declaration of Counsel and Exhibits Re Erum v. Waihee, No. 87-15156 (9th Cir.); On Behalf of Defendants
- 26 36 Order Denying Motion for Amendment of Certification Order - court will amend its certification order as to the second paragraph on page 3
- 37 Amended Certification From the United States District Court for the District of Hawaii
- Oct 13 38 Order from Supreme Court State of Hawaii - purs to this order, the entire record was transmitted to them on 10-18-88
- Nov 22 39 Order Consolidating Cases - with 88-00365
- 1989
Jun 7 40 Withdrawal and Substitution of Counsel and Order; on behalf of pltf - Johnston & Day withdraws and Mary

Johnston enters for Burdick

- 1990
Feb 12 41 Notice of Hearing of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Memorandum in Support of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Affidavit of Alan B. Burdick; Exhibits A & B; Proposed Order; set for 3/26/90 @ 9:00 a.m.
- Mar 14 43 Notice - Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief set for 3/26/9 @ 9:00 a.m., contd to 4/9/90 @ 11:15 a.m.
- Mar 22 44 Oral Motion for Extension of Time to File Response to the Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief, or In the Alternative for Continuance of the Hearing is Granted. The hearing is continued until May 7, 1990 @ 3:00 p.m.
- Apr 19 45 Notice of Motion; Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay; Memorandum In Support of Defendants' Counter-Motion for Summary Judgment and Conditional Motion for Stay and in Opposition to Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Declaration of Dwayne Yoshina; Proposed Orders; - on behalf of Defendants - set for 5/7/90 @ 3:00 p.m.
- 46 Declaration of Steven S. Michaels Re:

		Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "A" - "D" ("Burdick Federal Appendix")
47		Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "E" - "R" (" <u>Erum</u> Appellate Appendix") - on behalf of Defendants
48		Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "S" - "T" ("Burdick State Appendix") - on behalf of Defendants
Apr 30	49	Plaintiff's Memorandum in Opposition to Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay
May 2	50	Reply Memorandum in Support of Defendants' Counter-Motion for Summary Judgment and Conditional Counter Motion for Stay
7	51	Cross Motions for Summary Judgment; Defendants' Motion for Stay - Arguments held. Motions taken under advisement
10	52	Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay
15	53	Judgment - Summary Judgment is en-

		tered in favor of Plaintiff and against Defendants. Also the Motion for Permanent Injunctive Relief is granted
June 6	54	Notice of Appeal (By Defendants)
	11	Notice of Appeal sent to 9th CCA Clerk
	12	55 Notice of Appeal (By Defendant-Morris Takushi, et al.)
		56 Notice of Appeal (By Defendant-Benjamin Cayetano, et al.)
	13	Notices of Appeals (By Defendants-Takushi, Cayetano, et al.) sent to 9th CCA Clerk
Jul 9		Certificate of Record mailed to Clerk, 9th CCA (CA 90-15873 & 90-15876)
1991		
Aug 7	60	Judgment - 9th CCA - Reversed

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Docket No. 88-365 - CONSOLIDATED WITH 88-0582

DATE NR PROCEEDINGS

1988

May 17 1 Complaint for Declaratory and Injunctive Relief; Exhibits A - D; Summons
Summons Issued

June 7 5 Answer to Complaint for Declaratory and Injunctive Relief

Nov. 22 10 Order Consolidating Cases - with 86-0582 HMF

1989

Jun 7 11 Withdrawal and Substitution of Counsel and Order; Johnston & Day withdraws for Plaintiff and Mary Johnston enters

1990

Feb 12 12 Notice of Hearing of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Memorandum in Support of Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Affidavit of Alan B. Burdick; Exhibits A & B; Proposed Order; set for 3/26/90 @ 9:00 a.m.

Apr 19 16 Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "S" - "T" ("Bur-

dick State Appendix")

18 Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "E" - "R" ("Erum Appellate Appendix")

18 Declaration of Steven S. Michaels Re: Motions for Summary Judgment and Defendants' Conditional Cross Motion for Stay and Exhibits "A" - "D" ("Burdick Federal Appendix")

19 Notice of Motion; Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay; Memorandum In Support of Defendants' Counter-Motion for Summary Judgment and Conditional Motion for Stay and in Opposition to Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Declaration of Dwayne Yoshina; Proposed Orders

Apr 30 20 Plaintiff's Memorandum in Opposition to Defendants' Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay

May 2 21 Reply Memorandum in Support of Defendants' Counter-Motion for Summary Judgment and Conditional Counter Motion for Stay

7 22 Cross Motions for Summary Judgment; Defts' M/Stay - Arguments held. Motions taken under advisement

10 23 Order Granting Plaintiff's Motion for Summary Judgment and Permanent In-

junctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay

15	24	Judgment - Summary Judgment is entered in favor of Plaintiff and against Defendants. Also the Motion for Permanent Injunctive Relief is granted
June 6	25	Notice of Appeal (By Defendants)
11		Notice of Appeal sent to 9th CCA Clerk, and to all counsels
12	26	Notice of Appeal (By Defendant-Morris Takushi, et al.)
	27	Notice of Appeal (By Defendant-Benjamin Cayetano, et al.)
13		Notices of Appeals (By Defendants-Takushi, Cayetano, et al.) sent to 9th CCA Clerk, and to all counsels
Jul 9		Certificate of Record mailed to Clerk, 9th CCA - cc: all counsel (CA 90-15873 & 90-15876)
		Certificate of Record mailed to Clerk, 9th CCA - cc: all counsel (CA 90-15877)

RELEVANT DOCKET ENTRIES

HAWAII SUPREME COURT

7/28/88	Order certifying questions of Hawaii Law to the Supreme Court of the State of HI
08/04/88	Letter from Deputy Attorney General; re: Motion for Amendment of Certification
08/30/88	Amended Certification from U.S. District Crt. to Supreme Court of Hawaii
05/12/89	Notice of Setting Case for Argument (Monday, June 26, 1989 - 9:00 A.M.)
06/07/89	Withdrawal & Substitution of Counsel and Order (Mary Blaine Johnston appears)
07/18/89	Letter from M.B. Johnston Re: Attaching Decision of 4th Circuit Court of Appeals
07/21/89	Question answered in favor of Defendants Appellees

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

86-2689

- 10/8/86 Docketed Cause and Entered Appearances of Counsel. [86-2689]
- 10/10/86 Filed Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689 emergency motion to stay further action [86-2689], to consolidate case with case(s) 86-2703. [86-2689]; served on 10/9/86. [86-2689]
- 10/15/86 Filed Appellee Alan B. Burdick in 86-2689's opposition to aplt emergency motion for stay, suspension, or modification of injunction pending appeal. Served on 10/14/86. [86-2689]
- 10/15/86 Filed order (Hug, Poole, Norris) Aplt's emergency mot. for a stay of the D.C.'s injunction pending appeal is granted. [86-2689, 86-2703] in 86-2703 [86-2689, 86-2703]
- 10/23/86 Filed as of 10/22/86 appellant's Civil Appeals Docketing Statement served on 10/21/86. [86-2689 86-2703]
- 10/24/86 Filed as 10/22/86 certificate of record on appeal. RT filed in DC 10/10/86 [86-2689 86-2703]
- 1/21/87 Filed order (1) these appeals (86-2689 & 86-2703) are consolidated (2) apts shall file a brief of not more than 50 pgs on or before 3/2/87 (3) aple shall file a brief of not more than 50 pgs on or before 4/6/87 (4) apts may file a reply brief of not more than 25 pgs within 14 days of the service date of aple's

brief. [86-2689 86-2703]

- 3/12/87 Filed as of 3/11/87 original and 15 copies Appellants' opening brief, 50 pages, and 5 copies excerpt of record, served on 3/9/87. [86-2689 86-2703]
- 4/16/87 Received original and 15 copies Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's brief of 39 pages: Served on 4/14/87. (Motion to file late brief submitted simultaneously.) [86-2689, 86-2703]
- 4/21/87 Filed as of 4/16/87, Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703's motion to extend time to file appellee's brief until 4/16/87 [86-2689, 86-2703]; served on 4/14/87
- 5/4/87 Received orig. 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689's brief of 25 pages. (Aple's brief not yet filed.) [86-2689, 86-2703]
- 5/5/87 Filed order (Sneed) Aple's mot of 4/16/87, is construed as a mot. to late file his answering brief. So construed, aple's mot is granted. The brief already rec'vd shall be filed. [86-2689 86-2703]
- 5/5/87 Filed original and 15 copies appellee Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's 39 pages brief, served on 4/14/87. [86-2689, 86-2703]
- 5/5/87 Filed original and 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689, John W. Waihee in 86-2703, Morris Takushi in 86-2703 reply brief, 25 pages, served on 5/1/87 [86-2689, 86-2703]
- 7/10/87 Calendared: San Francisco Aug 13, 1987 9:00

A.M. Courtroom 3 [86-2689, 86-2703]

- 8/4/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703 letter dated 8/3/87 re: additional citations. (Panel) [86-2689, 86-2703]
- 8/5/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/4/87 re: additional citations. (Panel) [86 - 2689, 86-2703]
- 8/10/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703 letter dated 8/7/87 re: copy of Hawaii statute submitted previously is less relevant to the issue. Panel [86-2689, 86-2703]
- 8/10/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/7/87 re: response to aple's letter dtd 8/7/87. Panel [86-2689, 86-2703]
- 8/13/87 Argued and Submitted TO: William A. Norris, John T. Noonan, Russell E. Smith. [86-2689, 86-2703]
- 3/18/88 Rec'd notice of substitution of counsel for aple, Alan Burdick. Mary Blaine Johnston, Johnston & Day, enters; Boyce Brown, Johnston & Day, withdraws. [86-2689, 86- 2703]
- 5/17/88 Filed Opinion (Norris, author, Noonan, Smith) Vacated and Remanded with Instructions to Abstain from Deciding Federal Constitutional Issue Pending a Determination by the State Courts of Question Whether Hawaii Election Laws Permit Write-In Voting. Filed and

Entered Judgment [86-2689, 86-2703]

6/10/88 Mandate Issued [86-2689, 86-2703]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

86-2703

- 10/10/86 Filed Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689 emergency motion to stay further action [86-2689], to consolidate case with case(s) 86-2703. [86-2689]; served on 10/9/86.
- 10/10/86 Docketed Cause and Entered Appearances of Counsel. [86-2703]
- 10/15/86 Filed order (Hug, Poole, Norris) Apt's emergency mot. for a stay of the D.C.'s injunction pending appeal is granted. [86-2689, 86-2703] in 86-2703
- 10/23/86 Filed as of 10/22/86 appellant's Civil Appeals Docketing Statement served on 10/21/86. [86-2689, 86-2703]
- 10/24/86 Filed as of 10/22/86 certificate of record on appeal. RT filed in DC 10/10/86 [86-2689, 86-2703]
- 10/27/86 Filed certificate of record on appeal. [86-2703]
- 1/21/87 Filed order (1) these appeals (86-2689 & 86-2703) are consolidated (2) apts shall file a brief of not more than 50 pgs on or before 3/2/87 (3) aple shall file a brief of not more than 50 pgs on or before 4/6/87 (4) apts may file a reply brief of not more than 25 pgs within 14 days of the service date of aple's brief. [86-2689, 86-2703]
- 3/12/87 Filed as of 3/11/87 original and 15 copies Appellants' opening brief, 50 pages, and 5 copies

excerpt of record, served on 3/9/87. [86-2689, 86-2703]

- 4/16/87 Received original and 15 copies Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's brief of 39 pages: Served on 4/14/87. (Motion to file late brief submitted simultaneously.) [86-2689, 86-2703]
- 4/21/87 Filed as of 4/16/87, Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703's motion to extend time to file appellee's brief until 4/16/87. [86-2689, 86-2703]; served on 4/14/87
- 5/4/87 Received orig. 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689's brief of 25 pages. (Aple's brief not yet filed.) [86-2689 86-2703]
- 5/5/87 Filed order (SNEED) Aple's mot of 4/16/87, is construed as a mot. to late file his answering brief. So construed, aple's mot is granted. The brief already rec'vd shall be filed. [86-2689 86-2703]
- 5/5/87 Filed original and 15 copies appellee Alan B. Burdick in 86-2689, Alan B. Burdick in 86-2703's 39 pages brief, served on 4/14/87. [86-2689, 86-2703]
- 5/5/87 Filed original and 15 copies John W. Waihee in 86-2689, Morris Takushi in 86-2689, John W. Waihee in 86-2703, Morris Takushi in 86-2703 reply brief, 25 pages, served on 5/1/87 [86-2689, 86-2703]
- 7/10/87 Calendared: San Francisco Aug 13, 1987 9:00 A.M. Courtroom 3 [86-2689, 86-2703]
- 8/4/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703

letter dated 8/3/87 re: additional citations. (Panel) [86-2689, 86-2703]

- 8/5/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/4/87 re: additional citations. (Panel) [86-2689, 86-2703]
- 8/10/87 Received Appellee Alan B. Burdick in 86-2689, Appellee Alan B. Burdick in 86-2703 letter dated 8/7/87 re: copy of Hawaii statute submitted previously is less relevant to the issue. Panel [86-2689, 86-2703]
- 8/10/87 Received Appellant John W. Waihee in 86-2689, Appellant Morris Takushi in 86-2689, Appellant John W. Waihee in 86-2703, Appellant Morris Takushi in 86-2703 letter dated 8/7/87 re: response to aple's letter dtd 8/7/87. Panel [86-2689, 86-2703]
- 8/13/87 Argued and Submitted To: William A. Norris, John T. Noonan, Russell E. Smith. [86-2689, 86-2703]
- 3/18/88 Rec'd notice of substitution of counsel for aple, Alan Burdick. Mary Blaine Johnston, Johnston & Day, enters; Boyce Brown, Johnston & Day, withdraws. [86-2689, 86-2703]
- 5/17/88 Filed Opinion (Norris, author, Noonan, Smith) Vacated and Remanded with Instructions to Abstain from Deciding Federal Constitutional Issue Pending a Determination by the State Courts of Question Whether Hawaii Election Laws Permit Write-In Voting. Filed and Entered Judgment [86-2689, 86-2703]
- 6/10/88 Mandate Issued [86-2689, 86-2703]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90-15873

- 6/25/90 Docketed Cause and Entered Appearances of Counsel. [90-15873]
- 7/9/90 Filed Civil Appeals Docketing Statement served on 7/6/90 [90-15873]
- 7/23/90 Filed motion and deputy clerk order: Appellants' motion to consolidate appeal nos 90-15873, 90-15876, and 90-15877 is granted. Appellants' motion to expedite these consolidated appeals is granted (Motion recvd 7/18/90) [90-15873, 90-15876, 90-15877]
- 7/23/90 Filed certificate of record on appeal RT filed in DC 6/14/90 [90-15873, 90-15876]
- 8/10/90 Filed original and 15 copies Appellants' opening brief (Informal: n) 50 pages and five excerpts of record in volumes; served on 8/8/90 [90-15873, 90-15876, 90-15877]
- 8/13/90 Received Amicus State of Washington, State of Arizona, State of California, State of Nevada's brief in 15 copies of 21 pages; deficient: late; served on 8/9/90 [90-15873, 90-15876, 90-15877]
- 8/13/90 Filed Amicus State of Washington et al's motion to file late the brief which was served on 8/9/90 [90-15873, 90-15876, 90-15877]
- 9/10/90 Received Appellants Morris Takushi & Benjamin Cayetano's addendum to supporting appellant's brief, served on 9/6/90 (Panel) [90-15873, 90-15876, 90-15877]
- 9/13/90 Filed original and 15 copies appellee Alan B.

Burdick's 34 pages brief; served on 9/5/90. [90-15873, 90-15876, 90-15877]

9/24/90 Filed original and 15 copies Morris Takushi in 90-15873, Benjamin Cayetano in 90-15873, Morris Takushi in 90-15876, Benjamin Cayetano in 90-15877 reply brief, (Informal: n) 25 pages; served on 9/21/90 Panel [90-15873, 90-15876, 90-15877]

10/16/90 Filed order granting amicus motion to file late brief [90-15873, 90-15876, 90-15877]

10/16/90 Filed original and 15 copies State of Washington, State of Arizona, State of California, State of Nevada's brief of 21 pages; served on 8/9/90 (Panel) [90-15873, 90-15876, 90-15877]

11/5/90 Filed (in Hawaii) pltf/aple's additional citations, served on 11/5/90. (Panel) [90-15873, 90-15876, 90-15877]

11/5/90 Argued and Submitted To: Skopil, Beezer, Fernandez [90-15873, 90-15876, 90-15877]

3/1/91 Filed Opinion: Reversed (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]

3/18/91 Filed original and 40 copies Appellee Alan B. Burdick's petition for rehearing with suggestion for rehearing en banc 15 pages, served on 3/15/91 (Panel & All Active Judges) [90-15873, 90-15876, 90-15877]

3/18/91 Received Amicus Libertarian Party's brief in 40 copies of 3 pages; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]

3/19/91 Filed Libertarian Party's motion to become

amicus curiae; served on 3/15/91 [1900939] (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Appellant Morris Takushi & Appellant Benjamin Cayetano response opposing motion to become amicus [1900939-1] served on 3/21/91 (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Alan B. Burdick's motion to extend time to file petition for rehearing en banc until 3/22/91, served on 3/21/91 [1904568] (petition has been filed & it was served on 3/15/91, but aple informed aplt that it was untimely) (Panel)

3/28/91 Filed order (Robert R. Beezer,): Appellants are directed to file a response to appellee's petition for rehearing with suggestion for rehearing en banc, filed on 3/18/91. Said response shall not exceed 15 pages and shall be filed on or before 4/26/91. [90-15873, 90-15876, 90-15877]

4/1/91 Filed Amicus Libertarian Party's reply to response to motion to become amicus [1900939-1]; served on 3/28/91 (Panel) [90-15873, 90-15876, 90-15877]

4/2/91 Filed order (Otto R. Skopil, Robert R. Beezer, Ferdinand F. Fernandez): Upon due consideration, the motion for leave to file a brief of amicus curiae in support of the petition for rehearing and suggestion for rehearing en banc is granted. The Clerk is instructed to file the amicus curiae brief and circulate said brief to all active judges. 90-15873, 90-15876, 90-15877

4/2/91 Filed original and 40 copies Libertarian Party in 90-15873, Libertarian Party in 90-15876,

Libertarian Party in 90-15877's brief of 3 pages; served on 3/15/91 [90-15873, 90-15876, 90-15877] (Panel and All Active Judges)

- 4/15/91 Filed order (Robert R. Beezer): Aple's motion for an extension of time to file a petition for rehearing en banc from 14 days to 21 days is granted. [1904568-1] [90-15873, 90-15876, 90-15877]
- 4/29/91 Filed Appellant Morris Takushi & Benjamin Cayetano's response to petition for en banc rehearing served on 4/25/91. (Panel) [90-15873, 90-15876, 90-15877]
- 6/28/91 Filed Opinion: reopening case; denying petition for en banc rehearing in 90-15873, 90-15876, 90-15877 (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]
- 8/3/91 Mandate Issued [90-15873, 90-15876, 90-15877]
- 10/16/91 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 91-535 filed on 9/25/91. [90-15873, 90-15876, 90-15877]
- 12/13/91 Received notice from Supreme Court, petition for certiorari granted on 12/9/91 [90-15873 90-15876 90-15877]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90-15876

- 6/25/90 Docketed Cause and Entered Appearances of Counsel. Sent appellant(s) civil appeals docketing statement [90-15876]
- 7/9/90 Filed Steven S. Michaels for Appellant Morris Takushi's Civil Appeals Docketing Statement served on 7/6/90 [90-15876]
- 7/23/90 Filed motion and deputy clerk order: Appellants' motion to consolidate appeal nos 90-15873, 90-15876, and 90-15877 is granted. Appellants' motion to expedite these consolidated appeals is granted. (Motion recvd 7/18/90) [90-15873, 90-15876, 90-15877]
- 7/23/90 Filed certificate of record on appeal RT filed in DC 6/14/90 [90-15873, 90-15876]
- 8/10/90 Filed original and 15 copies Appellants' opening brief (Informal: n) 50 pages and five excerpts of record in volumes; served on 8/8/90 [90-15873, 90-15876, 90-15877]
- 8/13/90 Received Amicus State of Washington, State of Arizona, State of California, State of Nevada's brief in 15 copies of 21 pages; deficient: late; served on 8/9/90 [90-15873, 90-15876, 90-15877]
- 8/13/90 Filed Amicus State of Washington et al's motion to file late the brief which was served on 8/9/90 [90-15873, 90-15876, 90-15877]
- 9/10/90 Received Appellants Morris Takushi & Benjamin Cayetano's addendum to supporting ap-

- pellant's brief served on 9/6/90 (Panel) [90-15873, 90-15876, 90-15877]
- 9/13/90 Filed original and 15 copies appellee Alan B. Burdick's 34 pages brief; served on 9/5/90. [90-15873, 90-15876, 90-15877]
- 9/24/90 Filed original and 15 copies Morris Takushi in 90-15873, Benjamin Cayetano in 90-15873, Morris Takushi in 90-15876, Benjamin Cayetano in 90-15877 reply brief, (Informal: n) 25 pages; served on 9/21/90 Panel [90-15873, 90-15876, 90-15877]
- 10/16/90 Filed order granting amicus motion to file late brief [90-15873, 90-15876, 90-15877]
- 10/16/90 Filed original and 15 copies State of Washington, State of Arizona, State of California, State of Nevada's brief of 21 pages; served on 8/9/90 (Panel) [90-15873, 90-15876, 90-15877]
- 11/5/90 Filed (in Hawaii) pltf/aple's additional citations, served on 11/5/90. (Panel) [90-15873, 90-15876, 90-15877]
- 11/5/90 Argued and Submitted To: Skopil, Beezer, Fernandez [90-15873, 90-15876, 90-15877]
- 3/1/91 Filed Opinion: Reversed (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]
- 3/18/91 Filed original and 40 copies Appellee Alan B. Burdick's petition for rehearing with suggestion for rehearing en banc 15 pages, served on 3/15/91 (Panel & All Active Judges) [90-15873, 90-15876, 90-15877]
- 3/18/91 Received Amicus Libertarian Party's brief in

- 40 copies of 3 pages; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]
- 3/19/91 Filed Libertarian Party's motion to become amicus curiae; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]
- 3/25/91 Filed Appellant Morris Takushi & Appellant Benjamin Cayetano response opposing motion to become amicus served on 3/21/91 (Panel) [90-15873, 90-15876, 90-15877]
- 3/25/91 Filed Alan B. Burdick's motion to extend time to file petition for rehearing en banc until 3/22/91, served on 3/21/91 (petition has been filed & it was served on 3/15/91, but aple informed aplt that it was untimely) (Panel) [90-15873 90-15876 90-15877]
- 3/28/91 Filed order (Robert R. Beezer,): Appellants are directed to file a response to appellee's petition for rehearing with suggestion for rehearing en banc, filed on 3/18/91. Said response shall not exceed 15 pages and shall be filed on or before 4/26/91. [90-15873, 90-15876, 90-15877]
- 4/1/91 Filed Amicus Libertarian Party's reply to response to motion to become amicus [1900939 -1]; served on 3/28/91 (Panel) [90-15873, 90-15876, 90-15877]
- 4/2/91 Filed order (Otto R. Skopil, Robert R. Beezer, Ferdinand F. Fernandez): Upon due consideration, the motion for leave to file a brief of amicus curiae in support of the petition for rehearing and suggestion for rehearing en banc is granted. The Clerk is instructed to file the amicus curiae brief and circulate said brief to all active judges. 90-15873, 90-15876, 90-15877

- 4/2/91 Filed original and 40 copies Libertarian Party in 90-15873, Libertarian Party in 90-15876, Libertarian Party in 90-15877's brief of 3 pages; served on 3/15/91 [90-15873, 90-15876, 90-15877] (Panel and All Active Judges)
- 4/15/91 Filed order (Robert R. Beezer): Aple's motion for an extension of time to file a petition for rehearing en banc from 14 days to 21 days is granted. [90-15873, 90-15876, 90-15877]
- 4/29/91 Filed Appellant Morris Takushi & Benjamin Cayetano's response to petition for en banc rehearing served on 4/25/91. (Panel) [90-15873, 90-15876, 90-15877]
- 6/28/91 Filed Opinion: reopening case; denying petition for en banc rehearing in 90-15873, 90-15876, 90-15877 (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]
- 8/3/91 Mandate Issued [90-15873, 90-15876, 90-15877]
- 10/16/91 Received notice from Supreme Court: petition for certiorari filed Supreme Court No 91-535 filed on 9/25/91. [90-15873, 90-15876, 90-15877]
- 12/13/91 Received notice from Supreme Court, petition for certiorari granted on 12/5/91 [90-15873 90-15876 90-15877]

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

90-15877

- 6/25/90 Docketed Cause and Entered Appearances of Counsel. Sent appellant(s) civil appeals docketing statement setting schedule [90-15877]
- 7/9/90 Filed Steven S. Michaels for Appellant Benjamin Cayetano's Civil Appeals Docketing Statement served on 7/6/90 [90-15877]
- 7/23/90 Filed motion and deputy clerk order: Appellants' motion to consolidate appeal nos 90-15873, 90-15876, and 90-15877 is granted. Appellants' motion to expedite these consolidated appeals is granted. (Motion rec'd 7/18/90) [90-15873, 90-15876, 90-15877]
- 8/10/90 Filed original and 15 copies Appellants' opening brief (Informal: n) 50 pages and five excerpts of record in volumes; served on 8/8/90 [90-15873, 90-15876, 90-15877]
- 8/13/90 Received Amicus State of Washington, State of Arizona, State of California, State of Nevada's brief in 15 copies of 21 pages; deficient: late; served on 8/9/90 [90-15873, 90-15876, 90-15877]
- 8/13/90 Filed Amicus State of Washington et al's motion to file late the brief which was served on 8/9/90 [90-15873, 90-15876, 90-15877] served on 8/9/90
- 9/10/90 Received Appellants Morris Takushi & Benjamin Cayetano's addendum to supporting ap-

pellant's brief, served on 9/6/90 (Panel) [90-15873, 90-15876, 90-15877]

9/13/90 Filed original and 15 copies appellee Alan B. Burdick's 34 pages brief; served on 9/5/90. [90-15873, 90-15876, 90-15877]

9/24/90 Filed original and 15 copies Morris Takushi in 90-15873, Benjamin Cayetano in 90-15873, Morris Takushi in 90-15876, Benjamin Cayetano in 90-15877 reply brief, (Informal: n) 25 pages; served on 9/21/90 Panel [90-15873, 90-15876, 90-15877]

10/16/90 Filed order granting amicus motion to file late brief [90-15873, 90-15876, 90-15877]

10/16/90 Filed original and 15 copies State of Washington, State of Arizona, State of California, State of Nevada's brief of 21 pages; served on 8/9/90 (Panel) [90-15873, 90-15876, 90-15877]

11/5/90 Filed (in Hawaii) pltf/aple's additional citations, served on 11/5/90. (Panel) [90-15873, 90-15876, 90-15877]

11/5/90 Argued and Submitted To: Skopil, Beezer, Fernandez [90-15873, 90-15876, 90-15877]

3/1/91 Filed Opinion: Reversed (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]

3/18/91 Filed original and 40 copies Appellee Alan B. Burdick's petition for rehearing with suggestion for rehearing en banc 15 pages, served on 3/15/91 (Panel & All Active Judges) [90-15873, 90-15876, 90-15877]

3/18/91 Received Amicus Libertarian Party's brief in 40 copies of 3 pages; served on 3/15/91 (Panel) [90-15873, 90-15876, 90-15877]

3/19/91 Filed Libertarian Party's motion to become amicus curiae; served on 3/15/91 [1900939] (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Appellant Morris Takushi & Appellant Benjamin Cayetano response opposing motion to become amicus served on 3/21/91 (Panel) [90-15873, 90-15876, 90-15877]

3/25/91 Filed Alan B. Burdick's motion to extend time to file petition for rehearing en banc until 3/22/91, served on 3/21/91 [1904568] (petition has been filed & it was served on 3/15/91, but aple informed aplt that it was untimely) (Panel) [90-15873, 90-15876, 90-15877]

3/28/91 Filed order (Robert R. Beezer,): Appellants are directed to file a response to appellee's petition for rehearing with suggestion for rehearing en banc, filed on 3/18/91. Said response shall not exceed 15 pages and shall be filed on or before 4/26/91. [90-15873, 90-15876, 90-15877]

4/1/91 Filed Amicus Libertarian Party's reply to response to motion to become amicus, served on 3/28/91 (Panel) [90-15873, 90-15876, 90-15877]

4/2/91 Filed order (Otto R. Skopil, Robert R. Beezer, Ferdinand F. Fernandez): Upon due consideration, the motion for leave to file a brief of amicus curiae in support of the petition for rehearing and suggestion for rehearing en banc is granted. The Clerk is instructed to file the amicus curiae brief and cir-

- culate said brief to all active judges. [90-15873, 90-15876, 90-15877]
- 4/2/91 Filed original and 40 copies Libertarian Party in 90-15873, Libertarian Party in 90-15876, Libertarian Party in 90-15877's brief of 3 pages; served on 3/15/91 [90-15873, 90-15876, 90-15877] (Panel and All Active Judges)
- 4/15/91 Filed order (Robert R. Beezer): Aple's motion for an extension of time to file a petition for rehearing en banc from 14 days to 21 days is granted. [90-15873, 90-15876, 90-15877]
- 4/29/91 Filed Appellant Morris Takushi & Benjamin Cayetano's response to petition for en banc rehearing served on 4/25/91. (Panel) [90-15873, 90-15876, 90-15877]
- 6/28/91 Filed Opinion: reopening case; denying petition for en banc rehearing in 90-15873, 90-15876, 90-15877 Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Skopil; Beezer, author; Fernandez.) Filed and Entered Judgment. [90-15873, 90-15876, 90-15877]
- 8/3/91 Mandate Issued [90-15873, 90-15876, 90-15877]
- 10/16/91 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 91-535 filed on 9/25/91. [90-15873, 90-15876, 90-15877]
- 12/13/91 Received notice from Supreme Court, petition for certiorari granted on 12/9/91 [90-15873, 90-15876, 90-15877]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]

ALAN B. BURDICK,	)	Civil No. 86 0582
)	
<i>Plaintiff,</i>)	
)	
vs.)	
)	
MORRIS TAKUSHI, Director)	
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant)	
Governor of Hawaii;)	
)	
<i>Defendants.</i>)	

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff Alan B. Burdick, through his attorneys
Brown & Johnston alleges as follows:

I.

Preliminary Statement

1. This action alleges that administrative rules of Hawaii State Government prohibiting voters from writing-in on election ballots the names of individuals for whom they wish to vote, but whose names are not printed on the ballots, is a violation of both the Federal and State Constitutions and a denial of their civil rights.

2. Plaintiff Alan B. Burdick is a resident of the City and County of Honolulu and is a registered voter in the City and County of Honolulu, State of Hawaii.

3. Defendant Morris Takushi is a resident of the

City and County of Honolulu, State of Hawaii and is Director of Elections for the State of Hawaii. He is sued in his capacity as Director of Elections.

4. Defendant John Waihee is a resident of the City, and County of Honolulu, State of Hawaii. He is the Lieutenant Governor of the State of Hawaii and the Chief Elections Officer pursuant to Hawaii Revised Statutes ("HRS") Section 11-2 and is responsible for the conduct of the elections for State and Federal offices. He is sued in his capacity as Lieutenant Governor.

5. The statute governing elections, HRS Chapter 11, makes no express provision for voters to write in the name of a candidate or in any other way to vote for a candidate whose name is not printed on the ballot.

6. HRS Chapter 11 makes no express provision for the counting of votes for persons whose names have been written-in on a ballot, or for publishing the results of any write-in votes.

7. Plaintiff Alan B. Burdick resides in a State House Representative District where, as of July 23, 1986 (the deadline for candidates to file nominating papers) only one candidate filed to run for election to the State House of Representatives. Defendants have declared that the sole candidate who has filed for election in that State House of Representatives district has been automatically "elected". Thus, Plaintiff Burdick has no choice of candidate for that race. As to that race, Plaintiff Alan Burdick wants to vote, in both the primary and general elections, for a person who has not filed nominating papers and whose name will not be printed on the ballots for either the primary or general elections.

8. In addition thereto, Plaintiff wishes to vote for other persons in other elections, in both the primary and general elections in both State and Federal elections, in 1986 and in the future, whose names are not, or may not

be on the election ballot.

9. Plaintiff made inquiries both by phone call and by letter to the Defendant Lieutenant Governor Waihee to determine whether he would be permitted to write-in the name of candidates on the ballot. Plaintiff was informed by Mr. Morris Takushi, Director of Elections, that because the HRS Chapter 11 makes no explicit provision for a write-in vote that write-in voting is prohibited.

10. In response to Plaintiff Burdick's written inquiry, the Attorney General's Office issued an opinion letter asserting that neither the legislature nor the Lieutenant Governor were required to permit write-in votes. (See Exhibit 1 attached hereto).

11. Thus, Plaintiff Burdick will be unable to vote for or have a write-in vote for the candidate of his choice counted in the upcoming elections.

12. The denial of Plaintiff's right to vote for the person of his choice constitutes violations of the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States of America as well as violations of Article I, Sections 2, 4, 6 and 20, and Article II, Section 4, of the Constitution of the State of Hawaii.

13. The denial of Plaintiff's constitutional rights constitutes a violation of 42 USC 1983.

14. Defendants' refusal to permit the casting and counting of write-in votes is unauthorized by statute and constitutes conduct ultra vires of their authority under the Constitution and laws of the United States of America and the State of Hawaii.

15. Defendants' refusal to permit the casting and counting of write-in votes constitutes an abuse of their discretionary authority.

16. This court has jurisdiction of this action pursuant

to 28 USC 1343(3)(4) and 42 USC 1983.

II.

Jurisdiction

17. Plaintiff seeks declaratory and injunctive relief pursuant to 28 USC Sections 2201 and 2202.

III.

Claims for Relief

Wherefore, Plaintiff prays for relief as follows:

1. That this Court declare that a prohibition on write-in votes on election ballots is unconstitutional;
2. That this Court require Defendants to
 - a) Provide a space on the ballots for write-in votes
 - b) Count write-in votes
 - c) Publish the results of write-in votes
 - d) Instruct election workers to advise voters that they can write-in votes and inform the voters that write-in voting is permitted.
3. That this Court award Plaintiff costs of suit and attorneys' fees pursuant to 42 USC 1988.
4. That this Court grant Plaintiff such other and further relief as this Court deems just.

DATED: Honolulu, Hawaii, August 21, 1986

s/s
MARY BLAINE JOHNSTON
Attorney for Plaintiff
Alan B. Burdick
ACLU of Hawaii Foundation

[Letterhead -- Office of the Lieutenant Governor]

July 11, 1986

Mr. Alan B. Burdick
144 Kapaa Street
Kailua, Hawaii 96734

Re: Write-In Votes Inquiry

Dear Mr. Burdick:

As we earlier discussed, I am herewith forwarding to you a copy of the Letter Opinion of the Attorney General's office relative to above referenced matter.

Please do not hesitate to call me should you have any further questions regarding this matter.

Very truly yours,

/s/

GERARD JERVIS, Director
Special Projects and Constituent
Relations

Enclosure

Exhibit 1

[Letterhead -- Department of the Attorney General]

July 11, 1986

Mr. Gerard Jervis
Director of Research
Office of the Lieutenant Governor
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Jervis:

Re: Inquiry of Alan Burdick Regarding
Prohibition Against Write-In Votes

This responds to your request for our review of the issues raised in the material prepared by Alan Burdick which I received on June 26, 1986.

Essentially, Mr. Burdick asserts that the federal constitution mandates that Hawaii's election laws include provisions for write-in voting. He cites two cases, a 1985 opinion by the California Supreme Court and a 1967 Georgia Supreme Court decision, to support his contention. Although the more recent decision from California refers to United States Supreme Court decisions which address parties' candidates', and voters' rights, none of the federal cases seems to require the conclusion which Mr. Burdick urges, and the California and Georgia opinions themselves are of no precedential effect in Hawaii. We are, therefore, not persuaded that the Legislature, or the Lieutenant Governor, as the State's chief election officer, must enact laws or adopt rules which would allow write-in voting.

Very truly yours,

/s/

Charleen M. Aina
Deputy Attorney General

CMA:ai
36891

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[Caption Omitted In Printing]

**MOTION FOR SUMMARY JUDGMENT AND PRE-
LIMINARY AND PERMANENT INJUNCTIVE RELIEF**

Plaintiff Alan B. Burdick, through his attorney Mary Blaine Johnston, moves this court pursuant to Rules 56, 57 and 65(a) of the Federal Rules of Civil Procedure, for Summary Judgment in his favor on the Complaint and for a Preliminary and Permanent Injunction as set forth in the proposed order attached hereto.

The Motion is based on the Memorandum of Law and Exhibits attached hereto and the pleadings and files herein.

DATED: Honolulu, Hawaii, September 10, 1986.

_____/s/
MARY BLAINE JOHNSTON
Attorney for Plaintiff
American Civil Liberties
Union of Hawaii Foundation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

AFFIDAVIT OF ALAN B. BURDICK

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU) SS

Alan B. Burdick being first duly sworn on oath
deposes and says that:

1. I am the Plaintiff and attorney pro se in this
case.

2. At the end of May, 1986, I began an inquiry as
to whether or not voters in the 1986 election would be
able to write in the names of candidates.

3. I contacted Defendant Morris Takushi, the
Director of Elections, who told me that he interpreted
the lack of an express statutory authorization to allow
write-in votes as a prohibition on write-in voting.

4. At the suggestion of Mr. Takushi, I next spoke
with Gerard Jervis, Director of Research in the Lieuten-
ant Governor's office, and asked him if the Lieutenant
Governor's Office would change its policy against write-
in voting. Mr. Jervis asked me to make my request by
letter.

5. On June 6, 1986, I wrote to Mr. Jervis repeating
my request and transmitted copies of two court cases
that I believed would persuade the Lieutenant Gover-
nor's Office of the legal impropriety of its position. (A
true and correct copy of my letter to Mr. Jervis, without
enclosures, is attached hereto as Exhibit 1).

6. On June 24, 1986, Mr. Jervis wrote me stating
that the question had been referred to the Attorney
General's office. (A true and correct copy of this letter

is attached hereto as Exhibit 2).

7. On July 11, 1986, I received a response from
Mr. Jervis. He which included a letter that he had re-
ceived from the Attorney General's office in which a
deputy attorney general stated there was no reason to
change the policy. (A true and correct copy of the July
11 letter and its enclosure is attached hereto as Exhibit
3).

8. In the meantime, I had asked the ACLU if it
would help me in challenging the State's policy on write-
in voting.

9. As of July 23, 1986, the deadline for filing to run
in the primary election, only one person had qualified to
run as a candidate for the Hawaii State house of Repre-
sentatives seat in my district. I do not want to vote for
this candidate and I wish to write in another person's
name.

10. I expect that in other electoral contests in
November, 1986, and thereafter, I will not wish to vote
for any of the candidates listed on the ballot, even
though there is more than one candidate for a particular
office. In such elections, as well as in "uncontested"
elections, I regard it as essential to my rights as a voter
and citizen to be able to write in the name of persons
other than the listed candidates.

11. Unless this Court grants the relief I have re-
quested, i.e., that the State be required to provide a
space for write-in votes, and publish the results, I will be
irreparably harmed because I will not be able to vote for
the candidate of my choice.

Further affiant sayeth naught.

s/s
ALAN B. BURDICK

[September 9, 1986]
[Subscription Omitted in Printing]

June 6, 1986

Gerard Jervis, Esq.
Director of Research
Office of the Lieutenant Governor
Fifth Floor
State Capitol
Honolulu, Hawaii 96813

Re: The Right to Cast Write-In Votes

Dear Mr. Jervis:

During the past week, I have made several inquiries concerning the right of people to cast write-in votes. (Although I am an attorney, I am not representing anyone else on this matter at this time.) My initial inquiry to the Voter Education desk led me to Mr. Morris Takushi, the Director of Elections, who referred me to you.

In our telephone conversation on June 2, 1986, I advised you that I am asking the Office of the Lieutenant Governor to change its policy against write-in voting. You asked me to provide you a letter outlining my concerns and proposals. I write this letter in response to your request.

The Current Situation.

Elections in Hawaii are governed by state law. See generally H.R.S. Chapter 11. (These statutory provisions are, of course, subject to the safeguards of the United States and Hawaii constitutions.) The state election statutes neither expressly recognize the right of a voter to

cast write-in votes, nor do the statutes purport to deny that right.

In my telephone conference with Mr. Morris Takushi, the Director of Elections, on May 29, 1986, he told me that he interpreted the lack of an express statutory authorization to allow write-in votes as prohibiting him from allowing them. Thus, as a direct result of statutory silence and administrative decision, we have the following situation in Hawaii:

1. No space is provided on the ballots for write-in votes.
2. Write-in votes, if they somehow are squeezed in on the ballot, are not counted.
3. Since write-in votes are not counted, the fact of write-in votes being cast and the number and distribution of write-in votes actually cast are not published in the official tally of the election.
4. Election workers are evidently instructed to advise voters that they may not cast write-in votes.

The Law in the United States.

I believe that this policy infringes my rights under the First, Fifth, Ninth, Fourteenth, and Fifteenth Amendments of the United States Constitution, and the provisions of Article I, sections 1, 2, 4, 5, and 8 and Article II, section 4 of the Constitution of the State of Hawaii.

Courts throughout the United States have been nearly unanimous in holding that a blanket prohibition of write-in voting, such as exists in Hawaii, is unconstitutional. In a comprehensive and scholarly opinion, the California Supreme Court has recently struck down a municipal law prohibiting write-in votes. *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985). A copy of the decision is enclosed for your convenience of reference. In *Canaan*, the court found

Exhibit 1

that

the right of candidates to "seek the public's suffrage" and the right of . . . voters to cast ballots for the candidates of their choice . . . are of sufficient magnitude to warrant the protection of the First and Fourteenth Amendments (to the United States Constitution) and the comparable provisions of our State Constitution

Canaan, *supra*, 221 Cal. Rptr. at 475.

The court then went on to hold that:

San Diego's prohibition on write-in voting at the general election prevents voters from exercising "the free and pure expression of (their) choice of candidates" (*Gould v. Grubb*, *supra*, 14 Cal.3d at p. 677, 122 Cal. Rptr. 377, 536 P.2d 1337), thereby "effectively silencing a form of political dissent essential to our democratic process." (Constitutionality of Filing Deadlines, *supra*, at p. 722). "To restrict a voter to only those candidates whose names appear on the ballot arguably denies him any affirmative method of expressing his dissatisfaction with the listed candidates. He faces one choice: he must either select from a group of candidates, all of whom he deems unworthy, or not vote at all." (Batey, "Electoral Graffiti: The Right to Write-in" (1981) 5 Nova L.J. 201, 203.)

Id. at 476.

Political expression has, of course, always been recognized by the courts as entitled to the greatest protection of any form of constitutionally protected expression.

Thus, it is absolutely irrelevant whether or not a

given write-in candidate has a practical chance of election in a given election. In *Canaan*, the California Supreme Court recognized that lack of predictable electoral success is no barrier to the right of a voter to write-in the name of the candidate of his choice:

There will always be voters whose views, interests or priorities are not in any way represented by the candidates appearing on the ballot. While candidates who do represent these voters' views may have little chance of success, it is important in a free society that political diversity be given expression.

Id. *Accord*, *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 987 (S.D. Ohio 1968): "The use of write-in ballots does not and should not [depend] on the candidate's chance of success."

Obviously, the right to cast a write-in vote is worthless if it won't be counted and published. The court so held in *Canann*, stating:

A right to "express [one's] feelings" without legal effect, however, is antithetical to the fundamental nature of the right to vote. The First Amendment guarantees the right to *public* political expression. If the expression is so effectively muffled that no one can hear it, this guarantee is a hollow one. As this court has said in a slightly different context, "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or [the] right to pull a lever in a voting booth It also includes the right to have the vote counted at full value without dilution or discount."

Canann, *supra*, at 476-77 (emphasis in original; citation omitted).

Similarly, the Georgia Supreme Court stated in *Thompson v. Willson*, 223 Ga. 370, 155 S.E. 2d 401, 404 (1967), "A refusal to count [a write-in voter's] vote completely ignores it and is tantamount to a refusal to allow him to cast it." The Georgia Supreme Court then commented further on the practice of refusing to count write-in ballots:

We have heard of similar methods of holding elections in other so-called democratic countries which lay claim to being more completely democratic, but this is not the American way of holding elections, and our Constitutions protect us in guaranteeing our citizens these rights which have been fundamental in our various States since the dawn of this Nation. The Fifteenth Amendment of our Federal Constitution further enlarged on this right of citizens.

Id.

California in 1985 and Georgia in 1967 are by no means alone in finding that bans on write-in voting are unconstitutional. The California Supreme Court's decision in *Canaan* lists similar decisions in twenty-two different states. 221 Cal. Rptr. at 482 n.22. These decisions go back as far as the 1890's and range across the entire country.

Just as a sample, look at the courts that have held that write-in voting must be allowed where the statutes don't expressly permit write-in voting -- just as in Hawaii today. These courts include Indiana, 1967; Oregon, 1945; Iowa, 1915; Mississippi, 1912; Utah, 1911; Nevada, 1910; Minnesota, 1909; Illinois, 1895; and Missouri, 1892.

The Proposed Solution.

By this letter, I request that the Office of the Lieutenant Governor, for every future election commencing

with the September 1986 primary:

1. Provide adequate spaces on the ballots for write-in votes clearly marked as being for such votes. Where a single candidate is to be elected to a given office, one line obviously suffices. Where multiple candidates are chosen (as for example in the election for the State Board of Education), the lines for write-in candidates must equal the number of positions to be filled.

2. Count all write-in votes.

3. Publish, in all reports of election results, the names of each write-in candidate who has received votes and the number of votes he or she has received.

4. Inform the public, in conspicuous language in all voter-information materials, that they have the right to cast write-in votes, and that their write-in votes will be counted and published, just like all other votes.

The first three items are required, in my view, by the case law I have mentioned and the cases cited in the *Canaan* decision. I believe that the fourth item is necessary to correct the misunderstandings that must exist among the public. First of all, most voters, having never seen any space for write-ins on the ballot or any voter information telling them that they can cast write-in votes, naturally assume that they can't cast write-in votes. Second, if my situation is typical, those voters who have asked about write-in voting were told that they can't. Finally, everyone who reads the election results never sees any listings of write-in votes -- because write-in votes, if made, are never counted -- and they could naturally assume that there is no point in casting a write-in vote. The Office of the Lieutenant Governor must correct the misimpression that it has created among the

public.

During our telephone conference on June 2, you mentioned that you might refer this matter to the Attorney General for her official opinion. I urge you to do so if, for any reason, your office does not find this letter sufficiently persuasive to change the current policy without such a referral.

The primary election is on September 20, just three months away. A new policy, as outlined on the previous pages, must be in effect well enough before that time so that people will be fully aware of their rights.

Accordingly, I ask that you provide me, by June 25, 1986, a formal assurance by letter stating that the new policy will take effect by July 1, 1986 -- in ample time before the primary election, and that it will remain in effect for all future elections.

I will, of course, be pleased to discuss this matter further with you or any other representative of the State Government. Thank you very much for your consideration of this matter of our fundamental constitutional rights.

Sincerely yours,

/s/

Alan B. Burdick
144 Kapaa Street
Kailua, Hawaii 96734
(Tel. 547-5600)

ABB: tls

Enclosures: *Canaan* decision
Thompson decision

[Letterhead -- Office of the Lieutenant Governor]

June 24, 1986

Alan B. Burdick, J.D.
144 Kapaa Street
Kailua, Hawaii 96734

Dear Mr. Burdick:

Thank you for your letter of June 6, 1986 outlining your concerns and proposals over the right to cast write-in votes in Hawaii elections.

Recognizing the seriousness of your question, we have asked the Attorney General to review your request and the points you make. As soon as we hear from them, I will notify you.

Very truly yours,

/s/

GERARD JERVIS
Director of Research

Exhibit 2

[Letterhead -- Office of the Lieutenant Governor]

July 11, 1986

Alan B. Burdick, J.D.
144 Kapaa Street
Kailua, Hawaii 96734

Re: Write-In Votes Inquiry

Dear Mr. Burdick:

As we earlier discussed, I am herewith forwarding to you a copy of the Letter Opinion of the Attorney General's office relative to above referenced matter.

Please do not hesitate to call me should you have any further questions regarding this matter.

Very truly yours,

/s/

GERARD JERVIS, Director
Special Projects and
Constituent Relations

Enclosure

Exhibit 3

[Letterhead -- Department of the Attorney General]

July 11, 1986

Mr. Gerard Jervis
Director of Research
Office of the Lieutenant Governor
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Jervis:

Re: Inquiry of Alan Burdick Regarding
Prohibition Against Write-In Votes

This responds to your request for our review of the issues raised in the material prepared by Alan Burdick which I received on June 26, 1986.

Essentially, Mr. Burdick asserts that the federal constitution mandates that Hawaii's election laws include provisions for write-in voting. He cites two cases, a 1985 opinion by the California Supreme Court and a 1967 Georgia Supreme Court decision, to support his contention. Although the more recent decision from California refers to United States Supreme Court decisions which address parties', candidates', and voters' rights, none of the federal cases seems to require the conclusion which Mr. Burdick urges, and the California and Georgia opinions themselves are of no precedential effect in Hawaii. We are, therefore, not persuaded that the Legislature, or the Lieutenant Governor, as the State's chief election officer, must enact laws or adopt rules which would allow write-in voting.

Very truly yours,

/s/

Charleen M. Aina
Deputy Attorney General

CMA:ai

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]

ALAN B. BURDICK,	)	Civil No. 86 0582
)	
<i>Plaintiff,</i>)	
)	
vs.)	
)	
MORRIS TAKUSHI, Director)	
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant)	
Governor of Hawaii;)	
)	
<i>Defendants.</i>)	

**[PROPOSED] ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT AND FOR
PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF**

The Motion of Plaintiff Alan B. Burdick for Summary Judgment and for Preliminary and Permanent Injunctive Relief was heard by this court on _____.

The Court finds that there are no facts in dispute. Hawaii's election law neither expressly provides for nor expressly prohibits write-in balloting. However, State election officials, Defendants Morris Takushi and Lieutenant Governor John Waihee, have interpreted the law as neither allowing nor requiring means to be made for the casting and tabulating of write-in ballots.

The court finds that Defendants' failure and refusal

to provide for write-in balloting is, as a matter of law, a violation of Plaintiff's state and federal constitutional right to vote freely for the candidate of his choice. The Court finds also that this failure to provide for write-in balloting is an infringement on the First and Fourteenth Amendments rights guaranteed by the Constitution of the State of Hawaii and of the United States of America. Further, such constitutional infringement on Plaintiff's voting rights is a violation of Plaintiff's civil rights pursuant to 42 U.S.C. 1983.

Further, the Court holds that the rights of Plaintiff and other voters infringed on by Defendants' present policies regarding write-in balloting is of serious enough magnitude to warrant the issuance of an Order Granting Preliminary and Permanent Injunctive Relief.

The Court therefore orders as follows:

1. Summary Judgment in favor of Plaintiff is entered and Judgment is entered herein declaring that Defendants' present policies of not providing space on the election ballots for write-in of candidates' names, not counting write-in votes, and not publishing the results of write-in voting are unconstitutional.

2. Defendants Takushi and Waihee are hereby enjoined from refusing to provide for write-in balloting. Further, they are ordered that by the general election to be held on November 4, 1986, they are to:

1. Provide adequate spaces on the ballots for write-in votes clearly marked as being for such votes. Where a single candidate is to be elected to a given office, one line obviously suffices. Where multiple candidates are chosen (as for example in the election for the State Board of Education), the lines for write-in candidates must equal the number of positions to be filled.

2. Count all write-in votes and give these votes

all the same legal effect as other votes.

3. Publish, in all reports of election results, the names of each write-in candidate who has received votes and the number of votes he or she has received.

4. Inform the public, in conspicuous language in all voter-information materials, that they have the right to cast write-in votes, and that their write-in votes will be counted and published, just like all other votes.

5. Instruct all election officials and workers to advise voters that they may cast write-in votes and that such write-in votes will be counted, published and shall have the same legal affect as all other votes.

3. Plaintiff will be awarded attorney's fees and costs pursuant to 42 U.S.C. 1988 upon approval of his application for fees and costs by this Court.

DATED: Honolulu, Hawaii,

Judge of the United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

**ANSWER TO COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Come now Defendants Morris Takushi, in his official capacity as the Director of Elections of the State of Hawaii, and John Waihee, in his official capacity as the Lieutenant Governor of the State of Hawaii, by their attorneys, Corinne K. A. Watanabe, Attorney General of the State of Hawaii, and Lawrence L. Hines, Deputy Attorney General, and answer Plaintiff's Complaint as follows:

FIRST DEFENSE:

1. Plaintiff's Complaint fails to state a claim against Defendants upon which relief can be granted.

SECOND DEFENSE:

2. This Court lacks subject matter jurisdiction over this action.

THIRD DEFENSE:

3. Suit against Defendants is barred by the doctrine of laches.

FOURTH DEFENSE:

4. Suit against Defendants is barred by the doctrine of qualified immunity.

FIFTH DEFENSE:

5. Defendants admit the allegations contained in paragraphs 3, 4, 6, 9 and 10 of Plaintiff's Complaint.

6. Defendants deny the allegations contained in

paragraphs 1, 12, 14, 15, and 16 of Plaintiff's Complaint.

7. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 8 of Plaintiff's Complaint.

8. Defendants admit Plaintiff is a resident of the City and county of Honolulu and is presently registered to vote in the 19th State Representative District.

9. Defendants admit the allegations contained in paragraph 5 of the Plaintiff's Complaint but aver that Chapter 11, Hawaii Revised Statutes, is not the only Hawaii statute governing elections.

10. Defendants admit that Plaintiff is presently registered to vote in the 19th State Representative District and that only one candidate has filed to run for election in that State Representative District. Defendants deny that they have declared the sole candidate has been automatically elected, and are without sufficient knowledge or information to form a belief as to the truth of any and all other allegations contained in paragraph 7.

11. In response to paragraph 11, Defendants admit Plaintiff will not be allowed to write-in vote but are without sufficient information or knowledge to form a belief as to any and all other allegations contained therein.

12. Defendants admit the allegations contained in Paragraph 13 are generally true, however, Defendants deny that Plaintiff's constitutional rights have been violated.

13. Paragraph 17 of Plaintiff's Complaint does not require a responsive pleading.

14. Defendants deny each and every allegation in Plaintiff's Complaint not hereinabove specifically answered.

WHEREFORE, Defendants pray that this action be

dismissed and that Defendants be awarded their costs herein, including reasonable attorneys' fees, and such other relief as shall be deemed appropriate.

DATED: Honolulu, Hawaii, September 15, 1986.

CORINNE K. A. WATANABE
Attorney General

By s/s
LAWRENCE L. HINES
Deputy Attorney General
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

[Caption Omitted In Printing]

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

1. He is currently the Deputy Director/Election Systems Planner in the Office of the Lieutenant Governor, State of Hawaii. In that capacity he is responsible for the statewide operation of elections, election systems and services, and planning of election systems.

2. The state exclusively uses the electronic punch card voting system and such system has been in use for the past 12 to 14 years.

3. September 5, 1986, is the deadline for the filing of candidacy petitions, constitutional amendments and county charter amendments for the November general election.

4. The ballot codes, ballot types, contests, fonts, type style and ballot position of candidates for the November general election must be assigned by September 9, 1986.

5. On September 16, 1986, the order for the printing of the ballots for the general election was placed with the printer (without the names of the candidates) providing the count of the regular, absentee, reserve, duplicate and test ballots required for each district and precinct. At the same time the separate ballots were or-

6. On September 22, 1986, the ballot work sheets containing the candidates names and contests must be completed and sent to the printer.

7. On September 26, 1986, the absentee ballots for the general election are delivered by the printer and distributed to the county clerks on September 30, 1986. This is necessary to comply with the recommendation of the Federal Assistance Program that absentee ballots to overseas absentee voters be mailed at least 35 days before the election.

8. On October 17, 1986, all ballots for the polls arrive from the printer.

9. From October 17 to October 31, 1986, the ballots are inspected, inventoried, packed in ballot transport containers for each district and precinct and sealed.

10. From October 31 to November 3, 1986, the ballots are distributed to the Neighbor Islands.

11. On November 4, 1986, the ballots are delivered to all districts and precincts.

12. The State's entire election system is designed to accommodate the candidate nomination process and allow all qualified candidates to run.

13. Approximately three million ballot cards will be required and printed for use in the general election.

14. At present the ballot counting system is not designed to count write-in votes mechanically and write-in voting would necessitate the counting of three million ballots by hand in the upcoming general election.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (all defendants in the above-titled action), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Motion for Summary Judgment And for Permanent Injunction" entered in this action on the twenty-ninth day of September, 1986, and from the "Judgment in a Civil Case" entered in this action on the thirtieth day of September, 1986.

DATED: Honolulu, Hawaii, September 30, 1986.

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

/s/
CHARLEEN M. AINA
LAWRENCE L. HINES
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Attorneys for Defendants

[Certificate of Service Omitted in Printing]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[Caption Omitted In Printing]

**MOTION FOR STAY, SUSPENSION
OR MODIFICATION OF INJUNCTION**

Defendants, by and through their attorneys, Corinne K. A. Watanabe, Attorney General, State of Hawaii, and her undersigned deputy, move this Court, pursuant to Rule 62(c), Federal Rules of Civil Procedure, for an order staying, in toto or with respect to the general election to be held November 4, 1986, the Court's injunction and judgment requiring Hawaii to allow write-in votes to be cast, counted, and considered.

Defendants' motion is brought for the reasons set forth in the memorandum in support of this motion, the affidavits and exhibits attached hereto, and the pleadings and files herein.

DATED: Honolulu, Hawaii, October 3, 1986.

CORINNE K. A. WATANABE
Attorney General

By s/s
Steven S. Michaels
Deputy Attorney General
Attorneys for Defendants

[Caption Omitted In Printing]

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

1. He is currently the Deputy Director/Elections Systems Planner in the Office of the Lieutenant Governor, State of Hawaii. In that capacity, he is responsible for the preparation, printing, testing, distribution and tabulation of all ballots used in Hawaii's 1986 general election. Further, in light of the Court's Order Granting Motion For Summary Judgment and For Permanent Injunction filed September 29, 1986, he has been designated to head the technical task force formed by the Lieutenant Governor to implement the Court-required write-in vote casting, counting and reporting in the 1986 general election.

62

4. To implement Court-ordered write-in voting, the absentee and regular ballot cards normally used in Hawaii's electronic punch-card system to elect persons to fill state and county offices, i.e., ballot card types "A," "B" and "OHA," would have to be reformatted and reprinted. In addition, a second ballot card type "A" would probably have to be printed to accommodate the reformatting and provide sufficient space for write-in voting in the multimember county council races in Maui and Kauai counties.

5. Sequoia has informed Affiant that it cannot reprint the approximately 1 million candidate ballot cards that would need to be reformatted, within the four weeks that remain before the general election. Sequoia is obliged to complete ballot printing for other jurisdictions with whom it has contracted.

63

voting and provide sufficient space in which names may be written for each office, it is impossible to use the State's computer punch card system to cast, tabulate, or record write-in votes.

7. To implement the Court's order at all, write-in votes will have to be cast using the already-printed ballot cards and write-in ballot envelopes left over from previous elections in California. *See Exhibit "C."*

8. Because of the limited time remaining before the general election, Hawaii will not be able to purchase write-in ballot envelopes specifically made and printed for Hawaii's election. Sequoia has already indicated that because of its full printing schedule, it is not able to print such envelopes even though blank envelopes might be ordered from the manufacturer in a timely manner. Two other printing companies, Computer Elections Systems Services and St. Regis Paper, cannot guarantee delivery of envelopes with any instructions in the time remaining. The most reliable source for the requisite number of write-in envelopes is Santa Clara County of California which is willing to sell Hawaii 500,000 of its surplus envelopes for \$5.00 per thousand. However, the instructions for using the envelope are printed in English, or English and Spanish, in an undetermined proportion. Other possible sources of envelopes are Los Angeles County and King County in Washington State. The envelope style and number available in each jurisdiction are as yet unknown.

9. Because the envelopes to be used for write-in voting were not manufactured specifically for Hawaii, the requisite Japanese translation of the envelope's instructions will have to be prepared on a separate sheet of paper for inclusion in all ballots, including absentees, distributed by the Counties of Hawaii, Kauai and Maui, to satisfy the requirements of the Voting Rights Act Amendments of 1982. *See Exhibit "D."* Absentee ballots cannot be mailed until these translations are made,

verified and prepared. (Instructions for voters using regular ballots on election day for write-in voting will be posted at each polling place. In the three Neighbor Island counties, these instructions will have to be translated into Japanese, verified and printed before they can be used.) Efforts are currently underway to draft relevant instructions, but because all instructions must be coordinated with the Department of the Attorney General in light of the injunction, this drafting is still ongoing as of this writing.

10. It is currently intended, to ease somewhat the administrative burden imposed by the Court's order, to allow absentee voters who wish ballots immediately to acknowledge in writing that at their request, a write-in ballot envelope was not provided with their absentee ballots. If requests for absentee ballots are not accompanied by the written acknowledgment (or waiver), a write-in ballot envelope (with the separate instruction sheet) will be included with the absentee ballot which is sent to the voter.

11. It is currently intended that a voter wishing to cast a write-in vote for one or more offices on election day may request and will be given a write-in ballot envelope along with the appropriate ballot cards for the precinct in which the votes are being cast. Pens will be available in each voting booth to allow the voter to hand write the name and title of the office for which a write-in vote is cast on the lines printed in the inside of the write-in ballot envelope. If the voter wishes to vote for an individual nominated in the primary, the voter can do so by the usual method of punching out a hole on the right-hand side of the ballot opposite the preprinted name of the candidate. *See section 2-35-9(e), Hawaii Administrative Rules.* It is presently contemplated that the voted cards shall be placed in the write-in ballot envelope and the ballot and ballot envelope placed in a utility envelope which shall then be deposited into the

ballot box.

12. Ballots without write-in ballot envelopes will be processed in the usual manner as prescribed in chapter 16, Hawaii Revised Statutes, and title 2, chapter 35, Hawaii Administrative Rules. Ballots in write-in ballot envelopes will be opened, and the envelope and all ballot cards stamped with a common, unique number. The write-in ballot envelope and ballot cards will be compared for overvotes, i.e., a write-in and punched vote cast for the same office. If no overvotes appear, the ballot cards will be processed in the manner prescribed in chapter 16, Hawaii Revised Statutes, and title 2, chapter 35, Hawaii Administrative Rules.

13. The paper ballot process presents serious problems that are not covered by current election rules. One such problem is overvoting. Another problem is what to do with votes for Governor and Lieutenant Governor that are not cast in conformity with state law. Further problems include how specifically write-in votes must be cast, and how disputes about the validity, and legibility of write-in votes are to be resolved. Still another problem is how to deal with write-in attempts in county elections that have already been finally resolved under Hawaii Revised Statutes §§ 12-41. Exactly how the important legal questions of overvoting, legibility, and other matters will be dealt with are still under discussion as the State attempts to determine what the Court's decision means.

14. The last major election change implemented in Hawaii was in 1980, the first election held to elect trustees of the Office of Hawaiian Affairs. Although only 13.4% of all registered voters were permitted to vote in that election, long lines formed at many polling places as a result of the extra time voters and precinct workers needed to cast ballots for that election. Some voters who would have voted were turned away by the long lines, particularly between 7:00 a.m. and 8:30 a.m.,

and 4:30 p.m. and 6:00 p.m., traditionally the peak voting hours at the general election because few business and offices in the private sector are closed on general election day. Because of the limited period of time which election officials have had to design and test a system to cast, count and report write-in votes in Hawaii, the necessity for using material not specifically tailored to Hawaii's circumstances, and the newness of the experience in general, long lines, particularly at what traditionally have been heavy voting times, are expected.

15. In his capacity as the Deputy Director/ Elections Systems Planner, he is also responsible for supervising the review of petitions filed to form new political parties pursuant to section 11-62, Hawaii Revised Statutes. In 1986, because the total number of votes cast in the prior general election was 418, 904, the requisite number of signatures needed by a party seeking to be designated a political party and to secure access to Hawaii's 1986 general election ballot was 4,189.

Further Affiant sayeth naught.

/s/
Dwayne D. Yoshina

[October 3, 1986]
[Subscription Omitted in Printing]

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

CONG SEN REP
COUNTY OF MAUI
STATE OF HAWAII



A

OFFICIAL BALLOT GENERAL ELECTION TUESDAY, NOVEMBER 4, 1986

This stub shall be removed by the Election Official only

U. S. SENATOR Vote For Not More Than One (1)	
(R) HUTCHINSON, Frank	-
(D) INOUE, Daniel K.	-
U. S. REPRESENTATIVE Vote For Not More Than One (1)	
(D) AKAKA, Daniel K.	-
(R) MUSTACE, Marie M.	-
(L) SCHOOLLAND, Ken	-
GOVERNOR AND LIEUTENANT GOVERNOR Vote For Not More Than One (1) Party	
(R) ANDERSON, D. B. (Andy) For Governor	-
(R) FELDE, John Henry For Lieutenant Governor	-
(D) WAHNE, John For Governor	-
(D) CAYETANG, Ben For Lieutenant Governor	-
STATE REPRESENTATIVE Vote For Not More Than One (1)	
(D) TABARI, Harvey S.	-
(R) TAVARES, Larry L. T.	-

103

A

I HAVE VOTED, HAVE YOU?

(OVER)

This stub shall be removed by the Election Official only

FACSIMILE

102

(OVER)

EXHIBIT

68

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

CONG SEN REP
COUNTY OF MAUI
STATE OF HAWAII



A

OFFICIAL BALLOT GENERAL ELECTION TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

U. S. SENATOR Vote For Not More Than One (1)	
(R) HUTCHINSON, Frank	-
(D) INOUE, Daniel K.	-
U. S. REPRESENTATIVE Vote For Not More Than One (1)	
(D) AKAKA, Daniel K.	-
(R) MUSTACE, Marie M.	-
(L) SCHOOLLAND, Ken	-
GOVERNOR AND LIEUTENANT GOVERNOR Vote For Not More Than One (1) Party	
(R) ANDERSON, D. B. (Andy) For Governor	-
(R) FELDE, John Henry For Lieutenant Governor	-
(D) WAHNE, John For Governor	-
(D) CAYETANG, Ben For Lieutenant Governor	-
STATE SENATOR Vote For Not More Than One (1)	
(D) BOULSON, Matunga	-
(R) YOUNG, Peter	-
STATE REPRESENTATIVE Vote For Not More Than One (1)	
(R) O'NEILL, Anne	-
(D) SCHUTTE, Sandy Pashar	-

103

VOTE BOTH SIDES (OVER)

A

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)

This stub shall be removed by the Election Official only

MAYOR Vote For Not More Than One (1)	
(D) MIURA, Marvin	-
(R) TAMARES, Hannibal	-
COUNCILMEMBERS NO DISTRICT RESIDENCY Vote For Not More Than Two (2)	
(D) AKOHA, Abe (Chief)	-
(R) LINDLE, Linda	-
(D) MAKASONE, Bob	-
(R) VIVERO, Sam	-
CENTRAL MAUI Vote For Not More Than Three (3)	
(R) MEYER, Marco G.	-
(D) MERRILL, Wayne K.	-
(D) SANTON, Valma McWhynne	-
(D) TANAKA, Jang Suee	-
EAST MAUI Vote For Not More Than One (1)	
(R) MORROW, Thom	-
(D) OTE, Charles S.	-
MOLOKAI Vote For Not More Than One (1)	
(D) KAWANO, Robert S.	-
(R) PEARBODY, George G.	-
LANAI Vote For Not More Than One (1)	
(D) HOKAMA, Gary	-
(R) OLIVA, Perry	-

104

VOTE BOTH SIDES (OVER)

A

69

BEST AVAILABLE COPY

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

☐ CONE ☐ BAR ☐ REP ☐ COUN
 CITY COUNTY OF HONOLULU
 STATE OF HAWAII

TOP

A

OFFICIAL BALLOT
GENERAL ELECTION
 TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)
 This stub shall be removed by the Election Official only

U. S. SENATOR Vote For Not More Than One (1)	
(R) HUTCHINSON, Frank	-
(D) SHUYE, Daniel K.	-
U. S. REPRESENTATIVE Vote For Not More Than One (1)	
(D) HAHNEMANN, Mark	-
(L) HARRIS, Steve	-
(R) SAKI, Patricia (Part)	-
GOVERNOR AND LIEUTENANT GOVERNOR Vote For Not More Than One (1) Party	
(R) ANDERSON, D. G. (Andy) For Governor	▶
(D) FELIX, John Henry For Lieutenant Governor	-
(D) WARD, John For Governor	▶
(D) DAYETANG, Ben For Lieutenant Governor	-

125 **VOTE BOTH SIDES (OVER)** **A**

70

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

☐ CONE ☐ BAR ☐ REP ☐ COUN
 CITY COUNTY OF HONOLULU
 STATE OF HAWAII

TOP

A

OFFICIAL BALLOT
GENERAL ELECTION
 TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)
 This stub shall be removed by the Election Official only

U. S. SENATOR Vote For Not More Than One (1)	
(R) HUTCHINSON, Frank	-
(D) SHUYE, Daniel K.	-
U. S. REPRESENTATIVE Vote For Not More Than One (1)	
(D) AKAKA, Daniel K.	-
(R) MUSTACE, Mario M.	-
(L) SCHOOLLAND, Ken	-
GOVERNOR AND LIEUTENANT GOVERNOR Vote For Not More Than One (1) Party	
(R) ANDERSON, D. G. (Andy) For Governor	▶
(D) FELIX, John Henry For Lieutenant Governor	-
(D) WARD, John For Governor	▶
(D) DAYETANG, Ben For Lieutenant Governor	-
STATE REPRESENTATIVE Vote For Not More Than One (1)	
(R) ANDERSON, Whitney T.	-
COUNCILMEMBER Vote For Not More Than One (1)	
(R) KAHANA, David Wilson	-
(D) KIRKPATRICK, Christopher Wilson	-

135 **VOTE BOTH SIDES (OVER)** **A**

71

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

☐ CONG ☐ SEN ☐ REP
 COUNTY OF KAUAI
 STATE OF HAWAII

TOP

A

OFFICIAL BALLOT
GENERAL ELECTION
 TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)
 This stub shall be retained by the Election Officer only.

U. S. SENATOR Vote For Not More Than One (1)	
(R) HUTCHINSON, Frank	-
(D) SHOYE, Daniel K.	-
U. S. REPRESENTATIVE Vote For Not More Than One (1)	
(D) AKAKA, Daniel K.	-
(R) MUSTACE, Steve M.	-
(L) SCHOELLAND, Ken	-
GOVERNOR AND LIEUTENANT GOVERNOR Vote For Not More Than One (1) Party	
(R) ANDERSON, D. W. (Andy) For Governor	-
(R) PEARL, John Henry For Lieutenant Governor	-
(D) WATKINS, John For Governor	-
(D) CHAN TANG, Ben For Lieutenant Governor	-

199 **VOTE BOTH SIDES (OVER)** **A**

72

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)
 This stub shall be retained by the Election Officer only.

STATE SENATOR Vote For Not More Than One (1)	
(D) AKI, James	-
(R) KAPOA, Sherwood	-
STATE REPRESENTATIVE Vote For Not More Than One (1)	
(D) APO, Peter K.	-
MAYOR Vote For Not More Than One (1)	
(R) BARRETT, John F., Jr.	-
(D) KUMURA, Terry E.	-
COUNCIL MEMBERS Vote For Not More Than Seven (7)	
(D) ASANO, Ben (Kapa)	-
(R) CHLOE, Patrick J.	-
(D) COOPER, Mauna	-
(D) FURUKAWA, James	-
(R) HOUTON, John C.	-
(R) KIKAMA, John, II (Buloh)	-
(D) KUCI, Ronald	-
(R) MCDONALD-QUATE, Gloria	-
(R) MCDONALD, Abel	-
(D) MURPHY, Maurice A. (Joe)	-
(R) SA, Clarence W. Kapaeha	-
(D) TENDON, Jimmy	-
(D) YUKIMURA, JoAnn Ai	-
(R) ZABLAN, Laverne Maunaloa	-

166 **VOTE BOTH SIDES (OVER)** **A**

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

STATE OF HAWAII
TOP
B

OFFICIAL BALLOT
BOARD OF EDUCATION ELECTION
 FIRST SCHOOL BOARD DISTRICT
 (Island of Oahu)
 TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)
 This stub shall be retained by the Election Officer only.

YOU MAY VOTE IN ALL THREE CONTESTS

No Departmental School District Residency Vote For Not More Than Three (3)	
ARAKI, Mike	-
ARRE, Toy	-
BREWER, Jim	-
CHONG, Howard K. O. Jr.	-
DILLINGER, Paul	-
DOMINGO, P. C.	-
FURNARD, Elaine	-
HQ, Peter M. P.	-
HUGHES, James (Jim)	-
MEL, Evelyn K. S.	-
KAM, Thomas K. Y.	-
KANAHARA, Hester P.	-
LELANE, Frances	-
LOO, Andrew	-
MAGALDI, Joe	-
MASU, Sandra-Magdal	-
MATSUMOTO, Michael	-
MILLER, Catherine (Artale)	-
MON, Victor (Piney)	-
NORWOOD, Chuck	-
SAFO, Roy	-
SHORBA, Joe	-
SOUTHARD, Ronald W. (Renny)	-
SUTTON, Walter Kimo	-
UNWINE, Charles-Rene	-
WINTERS, William J. (Sam)	-
WOODE, William E. (Sam)	-
YOUNGBOET, Andy T.	-

303 **VOTE BOTH SIDES (OVER)** **B**

73

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)
 This stub shall be retained by the Election Officer only.

YOU MAY VOTE IN ALL THREE CONTESTS

4th Departmental School District Seat (Central Oahu) Vote For Not More Than One (1)	
AMANO, Paul	-
MORRIS, Frances	-
6th Departmental School District Seat (Windward Oahu) Vote For Not More Than One (1)	
KRAPP, Paul	-
PENEBACKER, John R.	-

302 **VOTE BOTH SIDES (OVER)** **B**

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

STATE OF HAWAII

TOP

B

OFFICIAL BALLOT
BOARD OF EDUCATION
ELECTION

SECOND SCHOOL BOARD DISTRICT
 (Courses of Hana, Maui and Kaunoi)

TUESDAY, NOVEMBER 4, 1986

This stub shall be retained by the Election Official only

2nd Departmental School
 District Seat (Maui)
 Vote For Not More Than One (1)

ARBOR, Kelly	-
UEOKA, Mayor M.	-

FACSIMILE

301 **B**

74

I HAVE VOTED, HAVE YOU?

(OVER)

This stub shall be retained by the Election Official only

FACSIMILE

102 (OVER)

ENGLISH FACSIMILE BALLOT

SIDE 1

SIDE 2

STATE OF HAWAII

TOP

OFFICIAL BALLOT
BOARD OF TRUSTEES
OFFICE OF HAWAIIAN AFFAIRS
ELECTION

TUESDAY, NOVEMBER 4, 1986

VOTE BOTH SIDES (OVER)
 This stub shall be retained by the Election Official only

YOU MAY VOTE IN ALL THREE CONTESTS

"AT LARGE" TRUSTEE
 (To Be Voted On Statewide)
 Vote For Not More Than Three (3)

BURGESS, Fred Kaitiaki	-
CHUN, Kellie S.	-
CLARK, Melvin Kaula	-
DE OCAMPO, Mary Kulehewa	-
DELA CRUZ, Linda Kulehewa	-
DEBOTO, A. Francis	-
FALLER, Robert	-
HABA, Odette Mahi	-
HOLT, Robin	-
KAHU-SILL, Rina Kaula	-
KAPANA, Abraham (Kaula)	-
KEALONA, Gary	-
KIHOPI, Verna P. (Aiea)	-
KIPOO, Arthur	-
KIRNEY, Patricia Pomahe	-
KIPIA, Francis	-
MAHOE, Kaula M. (Aiea)	-
MONAG, Myrtle M.	-
PREMAN, Kenneth	-
REIS, Herman	-
RYTE, Verna J.	-
ROWLAND, James Pomahe, Jr.	-
STUDENKA, Verna Kulehewa	-

MAUI RESIDENT TRUSTEE
 (To Be Voted On Statewide)
 Vote For Not More Than One (1)

KAMAHALA, Mimi	-
TERUJA, Christina Kaula	-

FACSIMILE

701 **VOTE BOTH SIDES (OVER)**

75

I HAVE VOTED, HAVE YOU?

VOTE BOTH SIDES (OVER)
 This stub shall be retained by the Election Official only

YOU MAY VOTE IN ALL THREE CONTESTS

OAHU RESIDENT TRUSTEE
 (To Be Voted On Statewide)
 Vote For Not More Than One (1)

CHING, Clarence F. T.	-
DELANEY, Linda L.	-
SPETER, Pearl Kaula	-
SELLERS, R. Loretta	-
SERRAO, Joseph P.	-
SING, Albert K.	-
SOLLER, S. C. Tony Kaula	-

FACSIMILE

702 **VOTE BOTH SIDES (OVER)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

ALAN B. BURDICK,	)	Civil No. 86 0582
)	
<i>Plaintiff,</i>)	
)	
vs.)	
)	
MORRIS TAKUSHI, et al.,)	
)	
<i>Defendants.</i>)	
)	

**ORDER DENYING MOTION FOR STAY,
SUSPENSION, OR MODIFICATION OF INJUNCTION**

Defendants' Motion for Stay, Suspension, or Modification of Injunction came on for hearing before this court on October 7, 1986. Mary Blaine Johnston, Alan Burdick, and Daniel Foley appeared on behalf of plaintiff, and Deputy Attorneys General Steven Michaels and Charleen Aina appeared on behalf of defendants. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

On September 29, 1986, this court entered an order granting plaintiff's motion for summary judgment and for permanent injunction, and ordering defendants to provide for the casting, counting, and considering of write-in votes in the Hawaii general election to be held on November 4, 1986. Defendants filed a notice of appeal to the Court of Appeals for the Ninth Circuit on the following day.

On October 3, 1986, this court granted defendant's *ex parte* motion to shorten time for hearing of the instant

motion, filed simultaneously with the order shortening time. Plaintiff filed a memorandum in opposition on October 6, 1986, and defendants filed a reply memorandum later on the same day.

The instant motion requests that this court stay its order pending consideration by the Court of Appeals, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. Defendants have submitted a thorough and candid explanation of the points on which they seek reversal of this court's previous order. However, as plaintiff correctly notes, any new arguments, citations, and factual allegations are improper in a motion to stay an injunction pending appeal. A motion to stay is not a substitute for a motion to reconsider. Once a notice of appeal has been filed, the district court no longer has jurisdiction to weigh the merits of the case at that time. *See Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1392 n.1 (9th Cir. 1984).

Nevertheless, this court's conclusion that defendants have raised no arguments which would warrant reconsideration, coupled with the possibility that the Court of Appeals might otherwise mistake the grounds upon which this court relies, compels the court to discuss the contentions now made by defendants. The Court of Appeals may eventually conclude that this court is obliged to resolve these new matters before an appeal will lie. Recognizing that this case must be concluded within the next few weeks, this court will, as a practical matter only, conduct the reconsideration which defendants obviously desire but are loath to request. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400 (1982).

I. Jurisdiction

Defendants suggest rather tentatively that "plaintiff lacks standing to obtain the injunctive relief awarded, particularly with respect to elections in which he is not

eligible to vote." Memorandum in support of motion ("DM") at 1. This point was not resurrected in oral argument. Without identifying the nature of this alleged standing defect, defendants cite generally to *Bender v. Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326 (1986), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660 (1983).

If defendants are attempting to argue that plaintiff has failed to allege a case or controversy, their reliance is misplaced. *Bender* involved the question of whether an individual school board member, who had been sued only in his official capacity, had standing to *appeal* in his individual capacity when the majority of the Board had decided not to challenge the trial court's ruling. *Lyons* held that past practices of the defendants do not justify consideration of an injunction unless there is a credible threat of immediate and irreparable harm ("Lyons' lack of standing [rests] on the speculative nature of his claims that he will again experience injury," 461 U.S. at 109, 103 S.Ct. at 1669). Obviously, plaintiff here is not in a position analogous to that of *Bender* or *Lyons*. He seeks to exercise his First Amendment rights, rights which the defendants have specifically stated their intention not to recognize.¹

As to the suggestion that plaintiff cannot obtain injunctive relief with respect to elections in which he is not eligible to vote, the court finds it also to be meritless. Under certain circumstances, plaintiffs may represent the constitutional rights of persons not before the court. *Population Services International v. Wilson*, 398 F. Supp. 321 (S.D.N.Y. 1975) (three judge court), *aff'd sub nom. Carey v. Population Services Intern.*, 431 U.S. 678, 97 S.Ct. 2010 (1977). To claim that only the elections in

¹ Curiously, defendants appear to argue on the one hand that plaintiff has no standing to bring this action, and on the other that he has waited too long in bringing it (see laches discussion, *infra* at 31).

which Mr. Burdick will vote should provide for write-in votes is analogous to saying, in a different context, that only Mr. Miranda himself is entitled to receive warnings against self-incrimination.

Even if this court's ruling were now properly restricted only to electoral contests in which plaintiff may cast his vote, however, as a practical matter defendants face the prospect of forced compliance in all races. Whether a voter asks for a write-in envelope or simply marks his ballot with a write-in vote, he is exercising his First Amendment privilege as found by this court to be proper. For defendants to delay compliance until assured that at least one voter in every electoral contest desired to cast a write-in vote would be pointless.

II. Standard for Adjudication of Motion

Rule 62(c) of the Federal Rules of Civil Procedure provides, in part:

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Rule 62(c) does not give the district court jurisdiction to "adjudicate anew" the merits of the case, but merely allows the court to preserve the *status quo* during the pendency of appeal. *McClatchy Newspapers v. Central Valley Typo., Etc.*, 686 F.2d 731 (9th Cir.), *cert. denied*, 103 S.Ct. 491 (1982).

Defendants urge the court to preserve the *status quo* by staying its earlier order, thus permitting the November 4 election to go forward as they had planned it prior

to September 29, 1986. At several points in their memorandum, defendants request a "temporary stay" covering only the imminent election. See, e.g., DM at 31.

As the court noted at the hearing, what defendants fail to recognize, and what plaintiff too may have overlooked, is that this court's order necessarily applies *only* to the November 4, 1986 order. The problem stems from the fact that the ban on write-in votes is a bureaucratic decision,² not a legislative act. As the parties earlier agreed at the hearing of the motion for summary judgment, Hawaii law neither prohibits nor provides for write-in voting.³ Only defendants' unilateral decision not to implement such a procedure in the upcoming election is before this court. Conceivably, the State could, through future legislation or executive fiat, provide for the write-in votes found by this court to be an expression protected by the First Amendment: therefore, the issue as to whether rights may be deprived in the future is not yet ripe. Consequently, to grant the "temporary stay" sought by defendants would be to moot the issue on appeal by giving defendants that which they initially asked for, to wit, no need to provide for write-in voting for the upcoming general election.

Nevertheless, the court will review the factors relevant to deciding a motion for stay pending appeal, which include (1) the likelihood that appellants will ultimately prevail on the merits, (2) the extent to which appellants will be irreparably harmed by denial of the motion, (3)

² In its earlier order, this court gave defendants the benefit of the doubt in applying the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). A reviewing court might find that such a test is not even applicable to a decision by administrative officials not to recognize constitutional rights, rather than an explicit legislative act.

³ Defendants' citation to *Jensen v. Sec'y of Haw., et als.* [sic], 40 Hawaii 604 (1954), does not affect this conclusion. See discussion *infra*, at 9-12.

the potential harm to plaintiff if the stay is issued, and (4) the public interest. *Turner v. Woods*, 559 F. Supp. 603, 619 (N.D. Cal. 1982), *aff'd*, 707 P.2d 1109 (9th Cir. 1903), *rev'd on other grounds*, 468 U.S. 1305, 105 S.Ct. 1138 (1985).

In this case, defendants' reliance on "state interests" concerning elections appears functionally equivalent to their view of the public interest in orderly and informed elections. Conversely, plaintiff equates the public interest with the right to exercise First Amendment freedoms. These conflicting positions weigh heavily in the determination of the likelihood of success on appeal. Accordingly, this court will defer consideration of factors (1) and (4) to a later stage of this opinion (see Section V, *infra*).

As to claimed irreparable harm to appellants, defendants argue that the possible confusion caused by write-in voting constitutes such bars. Obviously, though, any harm arising from confusion affects only the public interest in fair and informed elections, and not the defendants personally.⁴ Even if this court's order did somehow enjoin the State from effectuating its statutes, as claimed by defendants, see *New Motor Vehicle Board v. Orrin W. Fox Co.* 434 U.S. 1345 1351 (1977) (Rehnquist, J., in chambers), the State is not a defendant herein. Consequently, harm to the State -- in effect, harm to the people -- is a consideration weighing in analysis of the fourth *Turner* factor, and not the second.

The court finds that defendants themselves will suffer no irreparable bars should the instant motion be

⁴ Defendant Waihee is the Democratic candidate for governor and thus might suffer personally from election confusion. To the extent that he is able to avoid the apparent conflict of interest posed by his role as Chief Elections Officer, however, he does not appear in the lawsuit in his individual capacity. Any bars to his candidacy from the possible confusion is therefore irrelevant.

denied. Any administrative burden and inconvenience to the technicians in running the election with provisions for write-in votes does not rise to the level of irreparable harm.

Plaintiff, on the other hand, has already demonstrated the potential harm he will suffer if this court stays its order. Defendants' argument that plaintiff has suffered no monetary harm evades the issue. Where interference with a plaintiff's First Amendment rights is demonstrated to have occurred as a result of governmental action, irreparable harm is presumed. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976). The court therefore would find that the irreparable harm to be considered in this motion falls decidedly on the side of the plaintiff.

III. Hawaii's Elections System

Defendants criticize this court for allegedly failing to consider the prohibition⁵ on write-in voting within the context of the Hawaii election process, or in comparison with other states' restrictions on voting rights. Because defendants raise many of these arguments for the first time in the instant motion, the court will address each concern voiced in defendants' memorandum.

A. Origin of the Prohibition on Write-in Votes

Defendants now contend that the Hawaii statutory scheme prohibits write-in votes, at least implicitly. At

⁵ In their response to plaintiff in July, and in their opposition to the motion for summary judgment, defendants took the position that Hawaii law was silent regarding the implementation of write-in voting. This court therefore found the facts to be undisputed that the State neither permitted nor precluded such votes. Defendants have recently changed their position, arguing that Hawaii actually has an outright ban on such use of the franchise. Although this court is persuaded that the only such restriction originates in the Office of the Lieutenant Governor, the general term "prohibition" will be employed for purposes of this opinion.

oral argument, defendants identified two statutes as the source of the ban. Hawaii Rev. Stat. § 12-2 provides, in part, "No person shall be a candidate for any general or special general election unless he has been nominated in the immediately preceding primary or special primary."⁶ Hawaii Rev. Stat. § 16-26(1) merely states in pertinent part that a "questionable ballot" (including one which bears "any mark or symbol contrary to the provisions of law") will be set aside as uncounted.

Clearly, § 16-26(1) cannot itself be the source of a ban on write-in votes. Only if the statutory scheme elsewhere provides that write-in votes are prohibited would this section apply.

Defendants have not identified any explicit prohibition on this exercise of the franchise. Their reliance on § 12-2 as implying a ban seems misplaced. First, although this court does not so find, it is possible that the statute is intended only to place restrictions on ballot access, and not on the ability to mount a write-in campaign. Furthermore, the plain meaning of the section would bar only the actual *eligibility* of certain candidates; it does not prohibit a voter from attempting to cast his vote for such a person. Moreover, even at its most liberal construction, § 12-2 does not prevent a write-in campaign at the primary election stage. This irrefutable fact directly contradicts defendants' position that Hawaii permits write-in voting at *no* stage of the electoral process.

Nevertheless, defendants now claim that, "[s]o far as research has been able to disclose, Hawaii has never had write-in voting." The basis of this conclusion appears to be defendants' new-found reliance on *Jensen v. Sec'y of Haw., et als.* [sic], 40 Hawaii 604 (1954), a case which defendants claim stands for the proposition that write-in

⁶ This is presumably also the basis for defendants' contention that Hawaii has enacted a "sore loser" statute, *see infra* at 14.

votes violate Hawaii Rev. Stat. § 16-26(1). Defendants also argue that the "presumption of interpretation animating the court's opinion" was that allowing write-in voting "would radically change both the primary and [general] election laws." DM at 8.

This court has considered the *Jensen* case and concludes that it does not stand for the holding which defendants have ascribed to it. In *Jensen*, the Hawaii Supreme Court did invalidate the provision of Act 318 of the territorial legislature, permitting write-in voting. The Act, however, covered two subject matters: (1) voting by machine and the purchase of such machines and (2) authority to write in the names of candidates on the ballot. The court found that, because the title of the Act mentioned only the first purpose and not the second, it violated Title 45 of the Organic Act, which requires each law to "embrace but one subject, which shall be encompassed in its title." The *Jensen* court expressed concern about "hodge podge or log-rolling" legislation which might foist surprise and fraud on the legislature and the public by failing to reveal all subject matters of a bill by its title. Accordingly, the court invalidated the non-titled subject in Act 318, which happened to be write-in voting.

Far from declaring that write-in voting was impermissible, the court recognized that many states permit write-in ballots and that "[t]his may be highly desirable and exists in many communities." 40 Hawaii at 615. However, the court decided that such permission was a matter for legislative discretion. *Id.*

Most importantly, the *Jensen* court specifically avoided the constitutional implications of its ruling, noting that "[n]o claim [was] made that the Hawaiian statute violated any provision of the United States Constitution. . . ." *Id.* at 613. The court held only that the legislature could not have intended to pass the bill al-

lowing write-in votes,⁷ and that no such provision should be allowed to stand until the legislature had an opportunity to consider it in conformity with Section 45 of the Organic Act. However, as noted, the court did not consider the constitutionality of banning write-ins.

B. Participation Rights of Hawaii Voters

Defendants also purport to look to the "larger context of extremely liberal participation rights set forth explicitly in a carefully crafted 'reticulated statutory scheme'" in order to justify the prohibition against write-in votes. DM at 8. They note, for example, that every voter may vote in the primary of his choice, that voters are not confined to a single "nominating act," that placement on the ballot of a voter's candidate is subject to minimal restriction, and that a candidate is *guaranteed* a spot on the general election ballot by collecting signatures equivalent to 1% of the registered electorate. Defendants would therefore have the court find that the prohibition on write-in votes is of small or no significance, "at least at the primary [election] stage."

All of these activities in which voters are free to engage during the primary election process serve only one goal: to give a concerned voter the opportunity to place his candidate on the ballot, and to allow the candidate

⁷ The court's reasoning is somewhat disingenuous. It holds that "there was no intent on the part of the legislature to grant such a privilege even though it comes within the wording of the statute." 40 Hawaii at 611-12. The court speculates that the provision was overlooked because the bill was passed in the last few days of the legislative session (equally probable, of course, is that the write-in language was deliberately inserted to allow voters using the new voting machines to cast votes in the same manner as those who did not use the machines). Having struck down the explicit provision for write-in votes, the court then finds that the inclusion of language allowing write-in votes indicates that there was no former right to cast such a vote, and that the court's act in striking down the Act means that there remained no allowance of write-in votes.

to secure that spot. What defendants fail to recognize is that these ballot access measures at the primary stage are meaningless if dissatisfied voters will subsequently be restricted in their choice to the individuals whose names appear on the ballot in the general election. As the court has repeatedly noted, ballot access regulations are irrelevant to the issue of whether the State can restrict the actual casting of votes.

The inquiry cannot end at the primary election stage. It is insufficient for the State to take a position which can be summarized as a statement to the voters, in effect, that a failure to place one's candidate on the ballot precludes a voter from exercising his franchise however he pleases. Among other concerns, this attitude would completely ignore the possibility that changes in the political climate after the primary election might prompt voters to back a legitimate and qualified candidate not among those printed on the ballot. This court therefore finds that the participation rights accorded Hawaii voters, however laudable, are inadequate to meet the First Amendment rights of those voters.

C. Interests Served by the Electoral System

This court does not disagree with defendants' general statement that Hawaii's electoral system may place restrictions on who may serve if elected and even on whether votes will be counted or in any way considered. Obviously, there exists no unfettered right to have one's vote counted. Examples of truly meaningless votes include ballots left deliberately blank, spoiled ballots, illegible votes, and those cast for unidentifiable candidates. Nevertheless, the concerns identified by defendants as having been addressed by the present electoral system do not require the adoption of an absolute prohibition by the Chief Elections Officer against write-in votes.

1. Combatting Unrestrained Factionalism

The defendants spend such time discussing the so-

called "sore loser" issue; that is, when a party candidate is defeated in the primary election but continues to seek election in the general election. The United States Supreme Court has indeed recognized that the preclusion of intraparty feuding is a valid state interest. *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274, 1281 (1974) ("The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences").

Some states have addressed this issue by enacting "sore loser statutes," which disqualify a candidate defeated in the primary election from eligibility to run in the next general election. Whether Hawaii's electoral system incorporates such a rule is an open question not currently before this court.⁸

This court acknowledges that such measures serve state interests which are at least rational. Yet, no court, including this one, has ever ruled that a sore loser statute, if one exists in Hawaii, is either valid or invalid. More importantly, the existence or nonexistence of such a provision has little bearing on the constitutional right to cast a write-in vote. A sore loser statute affects whether or not particular candidates can *serve*, not whether a voter can cast a vote for those candidates or for others not appearing on the ballot.

A flat ban on write-in votes is overbroad to protect the asserted interest in discouraging factionalism. Although it may dissuade the supporters of a defeated candidate from continuing their campaign, it also needlessly prevents voters from casting their desired votes for an

⁸ One of the factors on which defendants pin their hopes of reversal is the alleged imminent consideration by the United States Supreme Court of the constitutionality of Washington's sore loser statute. As is discussed further, *infra* at 19-22, the defendants herein are mistaken in their understanding of the issues before the Court in the *Munro* case, and in the possible effect on this lawsuit of the Court's possible ruling.

otherwise legitimate and qualified write-in candidate who did *not* lose in the primary.

2. Maintaining Informed Voting and Avoiding Vacancies

Defendants further argue that a ban on write-in voting, by preventing late-blooming candidacies between the primary and general elections, serves the allegedly compelling interest of ensuring that the array of candidates available for voter selection includes only persons who have met valid constitutional and statutory requirements for holding office, have at least a modicum of support, and are able and willing to serve if elected. They also argue that the State can properly seek to avoid vacancies in elected offices.⁹

The court will have occasion to discuss this supposed problem at greater length. *See* Section V.B., *infra*. For now, it suffices to say that while a ban on write-in voting does indeed accomplish this objective (the compelling nature of which is questionable), it also prevents a voter from casting a vote for the candidate of his choice, even if that person is legitimately qualified and prepared to hold office.

In short, the court does not quarrel with defendants' assertion that Hawaii has some interest in ensuring that only qualified candidates are elected to public office. *Hayes v. Gill*, 52 Hawaii 251, 254 (1970) *appeal dismissed*, 401 U.S. 968 (1971). An outright ban on write-in voting, however, is too broad a restriction to serve the stated objective. As the Hawaii Supreme Court has

⁹ The case cited by defendants for this proposition, *Lynch v. Illinois State Bd. of Elections*, 682 F.2d 93, 97 (7th Cir. 1982), involved the question of whether a vacancy could be filled by appointment rather than by election. The court answered that question in the affirmative. This court assumes that defendants do not claim that the need to fill vacancies would justify doing away with elections entirely.

noted, in a case cited by defendants,

The fundamental interest to be protected here is that of the people of the [affected political district] in choosing whomever they please to represent them The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government.

Akizaki v Fong, 51 Hawaii 354 (1969) (emphasis supplied). As this court attempted to explain in its order granting summary judgment, a distinction exists between the proper regulation of candidates and the impermissible restriction of the franchise.

IV. The Nature of the Injunction

Defendants bemoan the alleged fact that "[u]nder this court's injunction, Hawaii's carefully tailored scheme for fostering informed, broad participation in the electoral process lies torn in shreds." DM at 17. This court does not believe that its injunction in this case will have the destructive effect attributed to it by defendants, nor is this court persuaded that defendants' prohibition on write-in votes is the result of any carefully tailored scheme. Rather, the arbitrary decision not to adjust the current voting procedures to provide for write-in votes seems to reflect a lethargic tradition of pursuing the path of least resistance.

At oral argument counsel for defendants invited the court to clarify the nature and the extent of its ruling. Because the court considers that most, if not all, of the ambiguities identified by defendants are simply imagined, it will address only the concerns raised by defendants in support of the instant motion.

First, defendants' complaints that the injunction amounts to doing away with the system of placing candidates on the ballots is simply incorrect. The vast major-

ity of candidates who can avail themselves of the opportunity to qualify for a position on the general election ballot will not rely on the possibility of success through a write-in campaign, but will instead vigorously seek to comply with the State's legislation providing for nomination through the primary election procedure. The validity of those requirements has not been challenged, and the court's injunction should not be interpreted as abrogating any of the provisions set forth in the present statutory election provisions. Furthermore, allowing a write-in vote is not inconsistent with the safeguards designed to ensure that a selection of qualified candidates appears on the ballot.

Defendants also claim that even candidates in uncontested races will be forced to continue campaigning "because of the fortuity that non-county office candidates in uncontested races are not deemed elected as of the date of the primary." DM at 17. The court does not view this circumstance as a fortuity. The legislature could have enacted a provision declaring such candidates elected as of the primary, but it chose not to do so. Defendants' position would relegate the general election, a forum traditionally left open to the voicing of public opinions and preferences, to a mere formality.

Another potential problem with the injunction seen by defendants is the possibility that "in the coming weeks declaratory actions may be filed in state or federal court to have particular candidates found eligible or ineligible to serve if elected on a write-in campaign." DM at 18. Defendants fear that, even if trial courts could pass on the merits of these cases, there would be (1) no time for appellate review, and (2) a danger of inconsistent rulings.

Although the court does not dismiss such a possibi-

ty, it appears that defendants' alarmist arguments¹⁰ envision a problem greater in theory than in fact. At the least, it would seem to the court that the same laches argument which proved unsuccessful in this action would still be available to the State if timely raised in these possible declaratory judgment actions, and it would apply with increasingly greater force as each successive day passes.

Finally, defendants maintain that the only sure result of permitting write-in voting will be that no voter "will have the faintest idea whether a write-in vote can in any fashion affect the outcome of the election." DM at 19. The court does not believe that the availability of an opportunity to write in will so perplex the electorate. However, even if such is the case, and a voter's perception of the effect of a write-in vote is that it may serve no valid purpose, he would then be more likely to take refuge in the list of candidates whose names appear on the ballot, insofar as that positioning represents a guarantee that those candidates are at least arguably qualified.

V. Merits of the Appeal

Defendants have advised this court of six arguments which they intend to pursue on appeal. As this court has already noted, the merits of those grounds are inextricably intertwined with the public interest as it relates to a

¹⁰ Defendants argue that some electoral contests will "grind to a halt" while the issue of eligibility is decided. This statement overlooks at least four facts. First, a write-in candidate must win before this is a real concern. Second, defendant Waihee himself is charged with determining eligibility, so that only a legitimate dispute as to his decision need go to the courts. Third, some candidates will be indisputably eligible to serve and can be certified as such virtually immediately. Fourth, there are a limited number of grounds for disqualification, at least some of which have already been litigated. See, e.g., *Hankins v. State*, 639 F. Supp. 1552 (D. Hawaii 1986) (five-year durational residency requirement is a valid restriction on candidates for governor).

motion pursuant to Rule 62(c). Consequently, the court will consider each argument not only as to its likelihood of success, but also insofar as it appears to affect the public interest.

A. Imminent Consideration of "Sore Loser" Statutes by the Supreme Court

Defendants correctly note that this court has found that a voter has the right to cast a vote in the general election for a candidate who has lost in a primary election. What defendants do not mention is that the court did not hold that such a candidate may serve if elected. As discussed above, the existence and the validity of a "sore loser" statute in Hawaii has yet to be contested or decided. In this area, the court's previous ruling stands only for the proposition that, even if a candidate is declared ineligible in advance of the election, State officials may not preclude a voter from casting a write-in vote for that candidate.¹¹

The main thrust of defendants' appeal on this point, evidently, is that the appeal of *Socialist Workers Party v. Secretary of State*, 765 F.2d 1417 (9th Cir. 1985), *prob. jur. noted sub nom. Munro v. Socialist Workers Party*, No. 85-656, 106 S.Ct. 783 (1986), is proceeding to oral argument on the day of this court's hearing of the instant motion, and that the Supreme Court "will thus be presented with the legality of a "sore-loser" statute, which, like Hawaii law" may erect the barriers previously identi-

¹¹ Some observers, including defendants, may view such a use of the franchise as an exercise in futility, or at least as a frivolous misuse of the right to vote. Nevertheless, in the opinion of this court, defendants are not in a position to pass judgment upon the values of others. A voter cannot be deprived of the right to cast such a vote any more than he may be prevented from spoiling his ballot, from voting for a deceased or fictitious person, or from failing to cast a vote at all. Each of these approaches to the ballot constitutes a mode of expression, the freedom to exercise which is guaranteed by the First Amendment.

fied by this court as impermissible. DM at 20.

First, this court does not find the source of the prohibition established by defendants to be equivalent to a sore loser statute. Not only is Hawaii's ban bureaucratic rather than legislative, but it also is much broader than a sore loser statute.

Second, and more importantly, this court has reviewed the *Socialist Workers Party* Court of Appeals decision which has been appealed to the Supreme Court, and it has also read the appellant's briefs, which have been provided to the court by the defendants in this case. Nowhere can the court locate the issue identified by defendants herein, *i.e.*, the validity of a sore loser statute.¹² The issue on appeal in *Munro*, as shaped by the appellants themselves in that case, is whether a State may prohibit the nominee of a "minor party" from appearing on the general ballot unless he receives at least 1% of the total primary vote.

If Washington's sore loser statute was truly at issue in *Munro*, if Hawaii indisputably had a valid sore loser statute, and if the effect of that statute was material to the court's decision in this case, a stay of the injunction, as defendants urge, would be seriously considered by this court as serving some useful purpose. Simply to stay the court-ordered write-in voting provision because Washington's restriction on minor party access to the ballot may be found constitutional, however, is illogical and unwarranted.

¹² The Circuit Court opinion notes only that Washington has a sore loser statute (a fact belied by appellants' argument that mounting a write-in campaign provides "a second chance to have voters express their approval or disapproval," *see* Appellants' Brief at 10), but then holds that writing in "is not an adequate substitute for having the candidate's name appear on the printed ballot." 765 F.2d at 1419. It is therefore arguable that the Washington sore loser statute actually permits voters to write in the losing candidate's name.

The pendency of a "voting rights case" before the Supreme Court does not automatically oblige lower courts to suspend all orders in the same general field. Such a result would be tantamount to requesting that this court suppress a confession in a criminal prosecution because the Supreme Court had before it an unrelated Fifth Amendment case. *Munro* is a ballot access case which does not address the issue of voters' rights *per se*. As the appellants in *Munro* recognize, in seeking to distinguish Washington's restriction on minor parties,

When a citizen is denied the right to vote, or the right to cast a vote that has the same weight as any other vote, strict scrutiny is obviously appropriate.

Appellants' Reply Brief at 5. In the instant case, in contrast to *Munro*, that issue is squarely before the court.

Defendants make the tangential argument that, even if this court's ruling is not in potential conflict with *Munro*, it is in actual conflict with the opinion in *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985). That case, as this court noted in its earlier order, is also a ballot access case, unlike the situation before this court. Its only value to defendants in this case is the circuit court's stray comment that, "as a practical matter, [a ban on write-in votes] is a trivial matter." 766 F.2d at 1173.

This casual remark by the circuit court was made in the context of a decision as to whether a requirement that a candidate secure signatures equal to 2% of the registered voters is an unreasonable restriction on access to the ballot in combination with other election laws. Moreover, the court said only that as a *practical* matter a ban on write-ins was trivial when viewed in light of the ballot access restriction.

Finally, to the extent that the Court of Appeals for the Seventh Circuit in *Simcox* actually intended to minimize the importance of the right to cast a write-in vote,

this court believes that court used an unfortunate choice of words. It is significant that the decision of the appellate court provides no authority whatsoever for its statement.

This court agrees with defendants that election laws must be viewed as a whole.¹³ This approach does not mean, however, that an unconstitutional law can be saved by mere coexistence with several constitutional laws. There must be some interrelationship among the laws which makes them valid as a unit. The relevant analysis is whether the rights abridged by the questioned law are compensated for by the other provisions in the overall electoral scheme.¹⁴ Even *Unity Party v. Wallace*, 707 F.2d 59, 62 (2d Cir. 1983), a case relied on by defendants, found that "the State provided an alternative [write-in voting] by which the individual appellants could

¹³ Defendants cite *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984), in support of the proposition that expression, including the casting of a vote, is subject to reasonable restraints on time, place, and manner. Aside from the fact that this position conflicts with defendants' argument that "when the state holds elections, it is doing so [only] to determine a winner who can serve," DM at 22 n. 11, this court cannot imagine a more reasonable time, place, and manner of expressing one's views of the voting process than by casting a write-in vote in the State's general election. Furthermore, to the extent that defendants seriously contend that a general election is not a forum for the expression of political opinions, but only a place "to choose winners," the court rejects this argument. To claim that the voters serve the function merely of mechanically determining who will take office is to rob the right to vote of its First Amendment protection.

¹⁴ Defendants claim that the State can ignore votes for ineligible candidates by refusing to count them or to provide a forum to facilitate such "speech". Their reliance on *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980), is somewhat bizarre. That case held that the states have no affirmative duty to make certain that medicaid funds are available to pay for abortions for indigent women. Moreover, Hawaii's desire to ignore invalid votes does not address the question of how it should or would consider *valid* votes.

have exercised their rights to vote and to politically associate." In Hawaii's case, this court finds that no alternative measures make up for the prohibition against write-in votes.

B. Qualification Procedures

Another point which defendants apparently intend to raise on appeal is this court's alleged action in sweeping away a vast number of statutory provisions. Defendants claim that they will be forced to count votes for candidates who have, by initiating "late-blooming" campaigns, circumvented the State's requirements concerning nominating papers and that the injunction opens the possibility that a candidate with no intention of serving will be elected.

The basis of this argument, as the court views it, is an overreaction to the court's order. As this court has attempted to explain, *supra* at 16-19, that order did not strike down the State's valid regulations regarding filing and candidacy. Indeed, the court's order did not even address itself to the right to be a candidate. The narrow issue considered by the court was whether a voter can cast a write-in vote in the general election. The decision on that issue does not "automatically invalidate every state regulation in this area Even a burdensome regulation may be validated by a sufficiently compelling state interest." *Carey, supra*, 431 U.S. at 686, 97 S.Ct. at 2016.

The heart of the court's order, a message consistently ignored by defendants, is that a voter has the opportunity to cast a write-in vote, but that he is not guaranteed, absent some indication from defendants, that his candidate will be able to take office. This is a risk that the voter consciously takes by deviating from the choice presented by the printed ballot. It does not mean, however, that the State can simply ban write-in votes because some voters may exercise the franchise in a manner that

appears unreasonable to election officials.

A fundamental distinction which the court makes is between disqualifying a candidate from serving, for some legitimate reason, and precluding a voter from voting in the way he feels is most proper, simply because election officials fear that he will not vote intelligently if he is allowed to write in. The basis for the court's earlier ruling was a finding that the prohibition which defendants seek to enforce is not merely a ban on all speech, but a content-based distinction which the court finds to be impermissible under the First Amendment.¹⁵

C. Chaos and Confusion

The aspect of this court's order which defendants find to be "the most disturbing" is the supposed inconsistency in holding on the one hand that it is desirable to seat candidates preferred by a plurality of the electorate, and on the other hand that this court will refrain from ruling at this time on the eligibility of a prevailing write-in candidate. Again, defendants have read more into this court's order than exists.

The court's refusal to pass on the eligibility of any particular candidate to take office stems from the "case or controversy" language of Article III of the Constitution. This standing requirement "tends to assure that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."

¹⁵ This distinction may be illustrated with reference to *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780 (1971). The exhortation on Cohen's jacket was found to be protected speech. The finding of constitutionality did not require, however, that the draft administrators comply with Cohen's wishes as expressed on his clothing. Similarly, a voter has the right to express his desire that a particular candidate be elected. State officials must acknowledge that wish by allowing its expression; however, they need not honor the request if the candidate is otherwise ineligible or unqualified to take office.

Bender, supra, at 1326. The court does not suggest that an ineligible candidate who prevails in the election could or should take office, but merely that the issue of eligibility in any given instance is one that the court cannot prejudge in the abstract. Thus, if a prevailing write-in candidate were found to be truly unqualified for office, the court has not prejudged his eligibility by finding in advance that he must be seated regardless of any objections to his qualifications.

This court can envision three types of potential write-in candidates: (a) qualified but ineligible candidates (such as sore losers, if there is a statute barring their election), (b) unqualified -- and therefore ineligible -- candidates (such as persons who do not meet age or residency requirements), and (c) qualified and eligible candidates. Defendants' position fails to distinguish among these groups and thereby bans voters from casting a write-in vote for *any* of them, whereas at least the third group appears facially entitled to take office if elected.

Defendants quibble with the court's use of the terms "count" and "consider" in the context of tallying write-in votes. These terms were used by the *Rhodes* and the *Canaan* courts, and the import intended by this court was not that defendants should give each vote equal validity regardless of whether it is cast for a name printed on the ballot, a genuine write-in candidate, a sore loser, or a fictitious character. The court's order requires only that defendants acknowledge the fact, if true, that Candidate X, even if he is later determined to be unqualified, received 17 votes for Governor. That result represents the political expression of 17 people who have the right to have their votes counted. Defendants must also consider the votes. In this example, that consideration will lead to the conclusion that the votes have been cast for an unqualified candidate. Those votes will not affect the election, in the same way that spoiled or blank ballots

will not affect the outcome, but they will have been "counted" and "considered" equally with all other votes.

In sum, the court believes that defendants have overvalued the uncertainty which will be caused by having write-in voting available in the upcoming election. Defendants advance only theoretical and speculative arguments unsupported by the record.¹⁶ In addition, this court's refusal to pass in advance on the eligibility of any candidate reflects only the practical consideration that no such ruling is necessary until a write-in candidate receives a plurality of the votes, yet is considered ineligible to take office for some reason as to the nature of which the court could now only speculate.

D. Administration of the Election

Another issue on appeal will apparently be the logistical obstacles allegedly attendant to running an election which provides for write-in votes. The affidavits of Dwayne Yoshina and Thomas Yamashiro for defendants, and of Alan Burdick for plaintiff, establish to the court's satisfaction that the election can go forward without the need of reprinting the ballots, and that write-in votes can be registered either by means of directly writing on the ballot, or by using a separate envelope. The most effective means of implementing the system is, of course, left to the sound discretion of the Chief Elections Officer.

Defendants claim that "however precious the right to vote by write-in may be, it cannot be justified at this late date, for this year's election." DM at 28. This court

¹⁶ At oral argument, defendants suggested that Mr. Yoshina's first affidavit must be liberally construed at the summary judgment stage. They did not indicate, however, the manner in which the court allegedly construed the affidavit too narrowly. Furthermore, Mr. Yoshina's inadmissible speculation as to the delay likely to occur could have been disregarded by this court pursuant to Rule 56(e) of the Federal Rules of Civil Procedure. However, in an effort to give the defendants every benefit, this court considered *all* of their arguments.

must, however, repeat its observation that the inconvenience to defendants of providing for such an option does not justify their abrogation of the constitutional rights of potential write-in voters.

As was the case with the pragmatic issues of eligibility, this court's earlier order did not attempt to answer the many practical questions as to administration of the election which are raised by the allowance of write-in voting, nor did the court intend to minimize the seriousness of those questions. However, simply to say that implementation of write-in balloting poses problems, without a reasonable showing that those problems are insoluble, suffers the sheer novelty of the situation to overwhelm what the court has found to be a clear constitutional right of the voters.

Based on the record, it appears to the court that defendants have taken vigorous and effective steps to comply with the court's order, and that such compliance can be effected by the time of the election. Defendants have set all of the concerns voiced by the court in *Wright v. Cripps*, 292 F. Supp. 294 (D. Del. 1968) (three-judge court). The Lieutenant Governor's office will apparently meet the deadline for mailing absentee ballots and the requirements for bilingual instructions. Although it would obviously ease defendants' burden significantly if this court were to remove the write-in requirement, that fact alone does not warrant staying the injunction.

E. Legislative Action

Defendants concede that one of their points of appeal is "entirely divorced from the merits." DM at 28. This argument, that the legislature (which is currently in recess) should be allowed to resolve or to clarify many of the legal questions presented by this action, was not even hinted at in the prior hearing. Defendants suggest, however, that it implicates the federalism concerns raised by a "federal court's refusal to allow a state legis-

lature a reasonable opportunity to devise a system of voting" to meet federal constitutional requirements.

Defendants concede that they are not making an argument for federal abstention. In any event, principles of federalism implicit in the abstention doctrine may be outweighed in an individual case by the "countervailing interest in ensuring each citizen's federal right to vote." *Badham v. U.S. Dist. Ct. for N.D. of Cal.*, 721 F.2d 1170, 1173 (9th Cir. 1983), *cert. denied*, 105 S.Ct. 1844 (1985).

The problem with defendants' argument is that it ignores the arguable inference that the legislature has, by its silence, already allowed for write-in votes. The decision banning write-in voting was made by the Chief Elections Officer (on advice of the Attorney General), and not by the legislature. Moreover, that official is charged with the administration of the elections and he consequently has within his own power the means to implement a system of providing for write-in voting. In fact, he was offered the opportunity to do so, without court intervention, by plaintiff's June 3, 1986 inquiry. His failure to comply with plaintiff's request necessitated the filing of this action.

Principles of comity and federalism do not dictate that this court refrain from righting a constitutional wrong in the hope that the legislature will eventually see its way clear to implementing regulations which will cure the defect perceived by the court. The issue is not simply whether a federal court can or should interfere with the administration of a state election, but rather whether a federal court can enjoin unconstitutional practices by state officials. Clearly, the answer must be in the affirmative; otherwise, federal courts would routinely be compelled to abstain from adjudicating actions brought pursuant to 42 U.S.C. § 1983, in order to permit the affected State legislature to act.

F. The Laches Defense

Defendants conclude their points on appeal with the argument that this particular plaintiff should not be allowed to obtain statewide relief because he has attempted to "sandbag the State's four-year general election and the entire statutory scheme underpinning it with a massive injunctive ambush." DM at 30. Defendants do not present any evidence that plaintiff intended such a result or that the court has effected it.

Furthermore, aside from the fact that it does not appear that plaintiff would gain anything from the bad-faith attack which defendants suggest he has mounted, the court notes that the argument that plaintiff acted dilatorily in this instance or followed other than a reasonable course in attempting to vindicate his First Amendment rights is completely unsupported by the record.

When plaintiff first brought this issue to defendants' attention, more than four months ago, he provided them with a detailed explanation, including cast authority, for his belief that a write-in opportunity was constitutionally necessary. Defendants eventually responded that they recognized "the seriousness of [his] question." June 24, 1986 letter from Gerard Jervis. Approximately five weeks after the initial contact, plaintiff learned that the Attorney General's office was of the opinion that

none of the federal cases seems to require the conclusion which Mr. Burdick urges, and the California and Georgia opinions themselves are of no precedential effect in Hawaii. We are, therefore, not persuaded that the Legislature, or the Lieutenant Governor, as the State's chief election officer, must enact laws or adopt rules which would allow write-in voting.

July 11, 1986 letter from Charleen Aina.

This letter opinion not only admits that Hawaii has made no provision for write-in voting, but also concludes that neither the legislature nor defendant Waihee had any affirmative obligation to do so. Nowhere in the correspondence from defendants is there the remotest suggestion, as defendants now claim, that they have consistently relied on the *Jensen* case for the authority that write-in voting in Hawaii had been prohibited for thirty years.¹⁷

The Chief Elections Officer, as implicitly conceded by the above quotation, has always had the power to moot this question by acceding to plaintiff's request. Consequently, not until defendants responded in the negative to plaintiff's questions was he aware that write-in voting would not be allowed in the 1986 elections.

Even then, this cast was not ripe; plaintiff could not know that he even wished to challenge the defendants' decision until he knew whether he actually wanted or needed to cast a write-in vote. He could not reach that conclusion, in turn, until he was acquainted with the total pool of candidates who, under defendants' rules, would possibly appear on the ballot eventually. That time arrived when the deadline for filing statements of candidacy passed on July 22, 1986. This suit was filed in early August, in a prompt and timely fashion.¹⁸

¹⁷ Defendants did not, of course, alert plaintiff to the existence of *Jensen* until four days before the date of the hearing on the motion to stay. They now raise the new argument, however, that plaintiff, a practicing attorney, should be deemed to have had constructive knowledge of the *Jensen* opinion, so that he should have perceived the need to seek earlier relief in the courts.

¹⁸ Although not dispositive of the laches question, the court notes that defendants had the ability to avoid the prejudice allegedly resulting from the late date of the court's order. As soon as they learned of plaintiff's position, in early June, they could have (a) made provision for write-in votes while reserving their right to contest the same, and
(continued...)

Defendants complain, however, that this court improperly granted summary judgment by filling gaps in the record adversely to defendants, and hence contrary to Rule 56 of the Federal Rules of Civil Procedure. Defendants do not point to any particular gaps which were allegedly filled; certainly they did not draw the court's attention to any factual issues at the time of the earlier hearing.

Defendants argue that the court resolved the question of plaintiff's good faith in his favor "without a single word of testimony." DM at 30. This is not true. Not only did Mr. Burdick address the court, albeit briefly, at the hearing, but he also submitted an affidavit in support of the motion. This court properly considered both sources of testimony. In any event, this argument is irrelevant. Laches is an affirmative defense, and defendants have the burden of showing that plaintiff did *not* act in good faith. This court found that defendants had completely failed to meet their burden.

Defendants not only failed to meet their burden of persuasion (a fact not relevant to a motion for summary judgment), they also failed to meet the burden of production. It was this latter omission which governed the court's ruling on the laches issue.¹⁹ Despite defendants'

¹⁸ (...continued)

(b) filed a declaratory judgment action. If the issue was resolved in their favor, they could have notified voters that the write-in spaces were invalid; if not, they would have been prepared to accommodate write-in votes.

¹⁹ Although it is true that this court did not explicitly set forth the standard governing motions for summary judgment in its previous order, Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact
(continued...)

repeated assertions that they were entitled to the benefit of all reasonable inferences as the opponent of the motion, the bare claim that plaintiff could have filed suit earlier, even if true, does not establish a genuine issue of material fact.

Defendants rely on *Anderson v. Liberty Lobby, Inc.*, U.S. ___, 106 S.Ct. 2505 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio*, ___ U.S. ___, 106 S.Ct. 1348 (1986), to argue that the court misapplied the standard to be used in considering summary judgment even when the facts are undisputed. In pertinent part, *Liberty Lobby* holds only that

[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

106 S.Ct. at 2511. *Matsushita* similarly holds that where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." 106 S.Ct. 1356 (citation omitted).

Defendants claim that the court resolved issues adversely to them without identifying those issues. They add the argument that plaintiff was allegedly on con-

¹⁹ (...continued)

and that the moving party is entitled to a judgment as a matter of law.

The moving party has the burden of demonstrating the absence of a genuine issue of fact. *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). The evidence must be viewed in the light most favorable to the opposing party on all factual issues. *Beltz Travel Service v. International Air Transport Ass'n*, 620 F.2d 1360, 1364 (9th Cir. 1980).

structive notice of the *Jensen* opinion even before they explicitly brought it to his attention. The applicable standard, however, is whether plaintiff has *inexcusably delayed* in pressing his rights. *Knox v. Milwaukee County Board of Elections Commissioners*, 581 F. Supp. 399, 402-03 (E.D. Wis. 1984). Defendants have failed to show that plaintiff delayed at all, let alone that such delay was inexcusable.

Defendants must also show that the delay prejudiced them. *Id.* This court has already found that plaintiff's conduct did not result in undue prejudice. Furthermore, when they learned of plaintiff's concern in early June, his delay in bringing suit did not preclude them from securing declaratory relief and/or from making contingency plans in the event that plaintiff ultimately prevailed. Any prejudice was accordingly self-inflicted.

VI. Conclusion

After a review of the points which defendants intend to press on appeal, this court is not persuaded that a stay of its injunction pending appeal is appropriate in this case. Even if granting a stay of the court's September 29, 1986 order would not moot the appeal, the court does not believe that defendants have made a substantial showing as to any of the four prongs of the *Turner* test for Rule 62(c) motions.

The root of the problem in this case is that defendants, unlike the State in *Unity Party, supra*, at 62, have in this case "erect[ed] some sort of ponderous portcullis barring [voter] access to the ballot [which] triggers heightened scrutiny to justify it." The flat prohibition on write-in voting materially impairs the right of Hawaii voters to participate in the general election process, and the excuses proposed by defendants do not adequately serve to validate the restriction.

As the Supreme Court has commented in another context, "The right to vote freely for the candidate of

one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964). This court believes that the November 4, 1986 election must include provision for write-in voting for those individuals who wish to exercise such an option.

Accordingly, defendants having failed to persuade the court that a stay of its injunction pending appeal is warranted, **IT IS HEREBY ORDERED** that the motion for stay, suspension, or modification of injunction be, and the same is, **DENIED**.

DATED: Honolulu, Hawaii, OCT 8 1986

s/s
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (all defendants in the above-titled action), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Denying Motion for Stay, Suspension, or Modification of Injunction" entered in this action on the eighth day of October, 1986, and from all previous orders and judgments in this action, particularly the "Order Granting Motion for Summary Judgment And for Permanent Injunction" entered in this action on the twenty-ninth day of September, 1986, and from the "Judgment in a Civil Case" entered in this action on the thirtieth day of September, 1986.

DATED: Honolulu, Hawaii, October 8, 1986.

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

/s/
CHARLEEN M. AINA
LAWRENCE L. HINES
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	Nos. 86-2689
	)	86-2703
<i>Plaintiff-Appellee,</i>)	
	)	DC# C-86-0582
vs.	)	(HMF) Hawaii
)	
MORRIS TAKUSHI, Director)	
of Elections, State of Hawaii,)	
et al.)	
)	
<i>Defendants-Appellants.</i>)	

ORDER

Before: Hug, Poole, and Norris, Circuit Judges

The appellants' emergency motion for a stay of the district court's injunction pending appeal is granted.

[October 15, 1986]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	CA NOS. 86-2689,
	)	86-2703
MORRIS TAKUSHI, Director)	
of Elections, State of Hawaii;	)	DC NO. CV-86-582
JOHN WAIHEE, Lieutenant	)	-HMF
Governor of Hawaii;)	
)	
Defendants-Appellants.)	
_____)	

APPEAL from the United States District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is vacated and remanded with instructions.

Filed and entered May 17, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,)	
)	
	)	Plaintiff,
)	
v.	)	Civil No. 88-00365
)	
BENJAMIN CAYETANO in)	
his capacity as Lieutenant)	
Governor of the State of)	
Hawaii; MORRIS TAKUSHI,)	
Director of Elections of)	
the State of Hawaii,)	
)	
Defendants.)	
_____)	

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

Plaintiff Alan B. Burdick, through his attorneys Johnston & Day, alleges as follows:

I

JURISDICTION

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1343(3)(4) and 42 U.S.C. 1983.
2. Plaintiff seeks declaratory and injunctive relief pursuant to 28 U.S.C. 2201 and 2202.

II

STATEMENT

1. Plaintiff Alan B. Burdick is a resident of the

City and County of Honolulu and is a registered voter in the City and County of Honolulu, State of Hawaii.

2. Defendant Benjamin Cayetano is a resident of the City and County of Honolulu, State of Hawaii. He is the Lieutenant Governor of the State of Hawaii and the Chief Elections officer pursuant to Hawaii Revised Statutes ("HRS") Section 11-2, and is responsible for the conduct of the elections for State and Federal offices. He is sued in his capacity as Lieutenant Governor.

3. Defendant Morris Takushi is a resident of the City and County of Honolulu, State of Hawaii, and is Director of Elections for the State of Hawaii. He is sued in his capacity as Director of Elections.

4. The Hawaii statutes governing elections, Hawaii Revised Statutes Chapter 11, make no express provision for voters to write in the name of a candidate or in any other way to vote for a candidate whose name is not printed on the ballot. Chapter 11 makes no provision that voters may not write in the names of a candidate or in any other way vote for a candidate whose name is not printed on the ballot.

5. HRS Chapter 11 makes no express provision for the counting of votes for persons whose names have been written in on a ballot or for publishing the results of any write-in votes.

6. In the 1986 election, Plaintiff Alan B. Burdick resided in a State House of Representatives district where only one candidate filed to run for election to the State House of Representatives by the candidate filing deadline. Plaintiff Burdick had no choice of candidate in that race and desired to vote for a person who had not filed nominating papers and whose name was not printed on the ballot for either the primary or general election.

7. In addition thereto, Plaintiff wished to vote for

other persons in other elections, both in the primary and general elections in both State and Federal elections in 1986 and now in 1988, whose names are not or may not be on the election ballot.

8. In 1986, Plaintiff made inquiries both by telephone and by letter to the Lieutenant Governor at the time, the Honorable John Waihee, to determine whether he would be permitted to write in the name of candidates on the ballot. Plaintiff was informed by Mr. Morris Takushi, Director of Elections, that because HRS Chapter 11 makes no explicit provision for a write-in vote, election officials would disregard write-in votes cast in the 1986 election or any other election.

9. Plaintiff filed suit in the United States District Court for the District of Hawaii on August 21, 1986 (*Burdick v. Takushi*, Civil No. 86-0582), seeking declaratory and injunctive relief.

10. On September 29, 1986, U.S. District Judge Harold Fong issued an Order Granting Motion for Summary Judgment and for Permanent Injunction. Judge Fong entered an order on October 8, 1986, denying the State's Motion for Stay, Suspension or Modification of Injunction.

11. The State then appealed Judge Fong's orders to the United States Court of Appeals for the Ninth Circuit, obtaining by emergency motion a stay of the District Court's injunction pending the appeal. (Order entered in 86-2689 and 86-2703 on October 15, 1986.)

12. The appeal to the Ninth Circuit Court of Appeals was briefed and then orally argued in August, 1987. To date, no decision on appeal has been rendered by the Ninth Circuit on that case.

13. Although the State appealed the Order Granting Summary Judgment and Injunctive Relief, it obtained no stay of that part of the order granting summary judg-

ment, obtaining only a stay of the injunctive relief which required the State of Hawaii to provide for write-in balloting in the 1986 general election.

14. Thus, to date, the law in Hawaii as decided by this Court in 1986, is that the State must provide for the casting, counting and reporting of write-in votes.

15. Upon taking office in December, 1986, Defendant Benjamin Cayetano made a promise to the people of Hawaii that he would seek enactment of legislation providing for write-in voting.

16. A bill that would provide for a highly circumscribed form of write-in voting was introduced in the 1987 legislative session (S.B. No. 1137). It was not passed. The bill was considered in the 1988 legislative session, but again was not passed.

17. The Hawaii legislature has had two years since the issuance of this Court's decision in *Burdick v. Takushi*, Civil No. 86-0582, to take appropriate steps to provide for write-in voting. It has failed to do so.

18. The 1987 Legislature passed S.B. No. 1146, now codified as Hawaii Revised Statutes, Section 15-3.5, which expressly provides for Federal write-in absentee balloting for overseas voters.

19. Federal law (pursuant to 42 U.S.C. 1973ff.2) provides that an overseas absentee voter has the right to cast a vote by writing in the name of a candidate or political party of his or her choice.

20. If Plaintiff were overseas at the time of the primary or general election, he would be able to cast a write-in vote for the candidate of his choice, pursuant to Federal law. However, if Plaintiff votes in the State of Hawaii in the Federal election, he can vote only for candidates who are listed on the ballot. Thereby he is deprived of the right an overseas absentee voter has to

write in the name of a candidate of his choice.

21. Although the deadlines for candidates to file to run for office have not yet passed, Plaintiff believes he and other voters will certainly be placed in the same position they were in in 1986 -- that is, they will be unable to cast write-in votes in either the primary or general election for either state or federal office.

22. Defendants' failure to provide for write-in voting will continue to deprive Plaintiff and other Hawaii voters of their full voting rights.

23. Plaintiff wrote to the Attorney General's Office in March, 1988, attempting to find out if write-in balloting would be provided for in the 1988 primary and general elections. (A copy of Plaintiff's letter is attached hereto as Exhibit A.)

24. On April 8, 1988, there having been no answer to Plaintiff's letter, Plaintiff's attorney wrote two letters to the Attorney General to find out if write-in balloting would be provided in the 1988 elections and also to inquire whether voting machines that were being inspected by the State for possible purchase had the capability of handling write-in voting. (Copies of these letters are attached hereto as Exhibits B and C.)

25. On April 28, 1988, Defendant Cayetano responded to these inquiries. His answer was that the State will not be providing Plaintiff or any other Hawaii voter with the opportunity to cast write-in votes. (A copy of Defendant Cayetano's letter is attached hereto as Exhibit D.)

26. Defendants' denial of Plaintiff's right to vote for the person of his choice by casting a write-in ballot constitutes violations of the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States of America, as well as violations of Article I, Sections 1, 2, 4, 6 and 20.

27. Defendants' denial of Plaintiff's right to cast a write-in ballot in Federal elections unless he is overseas is a denial of right to the equal protection of the laws as guaranteed by the 14th Amendment.

28. The denial of Plaintiff's constitutional rights constitutes a violation of 42 U.S.C. 1983.

29. Defendants' refusal to permit the casting and counting of write-in votes is unauthorized by statute and constitutes conduct ultra vires of their authority under the Constitution and laws of the United States of America and the State of Hawaii.

30. Defendants' refusal to permit the casting and counting of write-in votes constitutes an abuse of their discretionary authority.

III

CLAIMS FOR RELIEF

Wherefore, Plaintiff prays for relief as follows:

1. That this Court declare that a prohibition on write-in votes on election ballots for the 1988 primary and general elections is unconstitutional;
2. That this Court require Defendants to
 - a) provide a space on the ballots for write-in votes;
 - b) count write-in votes;
 - c) publish the results of write-in votes;
 - d) instruct election workers to advise voters that they can write in votes and inform the voters that write-in voting is permitted.
3. That this Court award Plaintiff costs of suit and attorneys' fees pursuant to 42 U.S.C. 1988.
4. That this Court grant Plaintiff such other and

further relief as this Court deems just.

DATED: Honolulu, Hawaii, May 17, 1988.

s/s
MARY BLAINE JOHNSTON
Attorney for Plaintiff

s/s
ALAN B. BURDICK
Plaintiff Pro Se

s/s
KIRK CASHMERE
American Civil Liberties Union
Foundation of Hawaii
Attorney for Plaintiff

[Letterhead -- Alan B. Burdick]

February 24, 1988

Steven S. Michaels, Esq.
Deputy Attorney General
Room 405, State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: *Burdick v. Takushi*
Write-In Voting Lawsuit

Dear Mr. Michaels:

As I am sure you are aware, Judge Fong's decision declaring that voters have the constitutional right to cast write-in votes remains the law of the land in the State of Hawaii.

This letter is to request that you assure me, at the earliest possible time, that the State's election officials are taking in a timely manner all steps necessary to ensure that all voters in the State will be able to cast write-in votes in both the September primary and the November general election. I trust that, with nearly two years to do the proper planning, the election officials have devised a procedure that will be simple, easy to use by voters, protective of secrecy, and compatible with vote-counting procedures, so that there will be no delays in reporting the votes cast for listed candidates.

Thank you very much for your cooperation in this matter.

Sincerely yours,

s/s

Alan B. Burdick

ABB/mm

cc: Attorney General Warren Price, III
Kirk Cashmere, Esq., ACLU
Mary Blaine Johnston, Esq.

Exhibit A

[Letterhead -- Johnston & Day]

April 8, 1988

Steven Michaels
Deputy Attorney General
Room 405, State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: *Burdick v. Takushi*,
Write-In Voting Lawsuit

Dear Mr. Michaels:

I have received a copy of a letter to you from Alan Burdick dated February 24, 1988, requesting that you insure him in writing that the State is taking steps to make write-in votes available for both the September primary and November general election, 1988. It is my understanding from Mr. Burdick that he has received no response to his letter.

As attorney for Mr. Burdick in the *Burdick v. Takushi* lawsuit, I am hereby requesting that you advise me in writing no later than Monday, April 18, 1988, that the State will be providing for write in balloting in both the September primary and the November general election. If I have not had confirmation that the State is taking such steps to comply with the judgment rendered by Judge Fong in 1986, I will have no choice but to file a new lawsuit asking that the Federal Court rule that the State must provide for write-in balloting in both the September and November elections. It is unfortunate that the Ninth Circuit has not yet rendered its decision, but until it does, Judge Fong's ruling remains the law.

Sincerely yours,

/s/

Mary Blaine Johnston

CC: Alan S. Burdick, Kirk Cashmere, Esq.
American Civil Liberties Union

Exhibit B

[Letterhead -- Johnston & Day]

April 8, 1988

Steven Michaels
Deputy Attorney General
Room 405
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Selection of New Voting Equipment

Dear Mr. Michaels:

I have read in the paper that Lieutenant Governor Benjamin Cayetano is presently in the process of looking at a variety of voting machines with an eye toward the State's purchasing them for use in future elections. By way of this letter I am putting the State on notice that it is expected that any voting machines that are considered for purchase for use in the elections in Hawaii have the ability to handle write-in votes. As you are well aware, Judge Fong's decision in 1986 that the State must provide for write-in voting remains the law in this State and I anticipate that the Ninth Circuit Court of Appeal's is going to uphold this decision when it renders its decision on the appeal. We therefore urge the Lieutenant Governor to make sure that any machine he recommends for purchase be able to comply with the law.

Sincerely yours,

/s/

Mary Blaine Johnston

CC: Alan B. Burdick
Kirk Cashmere

Exhibit C

[Letterhead -- Office of the Lieutenant Governor]

Ref. 884932

April 25, 1988

Mary Blaine Johnston, Esq.
Johnston & Day
Second Floor
222 Merchant Street
Honolulu, Hawaii 96813

Burdick v. Takushi, No. 86-2689 & 86-2703 (9th Cir. argued Aug. 13, 1987) (constitutionality of Hawaii's prohibition on the counting of write-in votes at the primary and general elections)

Dear Ms. Johnston:

This letter responds to Mr. Alan Burdick's letter of February 24, 1988, and your two letters of April 8, 1988, which have been referred to the Office of the Lieutenant Governor by the Department of the Attorney General, State of Hawaii.

As you know, this issue is presently in litigation following the State's appeal of Chief Judge Fong's orders of September 29, and October 8, 1986, and the stay of those orders entered by the United States Court of Appeals on October 15, 1986.

We have been advised by the Attorney General that, in its present procedural posture, all injunctive orders emanating from the federal court proceedings have been stayed and we may reasonably rely on the Ninth Circuit's order of October 15, 1986, as alternatively staying any injunctive order respecting the 1988 elections as may have been within the scope of Chief Judge Fong's 1986 decisions, or indicating that the Court of Appeals would

stay any new injunction that Chief Judge Fong might choose to enter pending a decision on the instant appeals. The Department of the Attorney General has also advised us that in light of intervening precedent it is much more than likely that any dissolution of the stay presently in effect, or refusal to stay any new injunctive order, would be reversed.

You may be aware that, in 1987, legislation was submitted at my request in the State Legislature that would have provided authority for the counting of write-in votes under prescribed circumstances in the primary and special primary elections. I believe now, as I did when the legislation was submitted, that, as a matter of policy, and subject to reasonable restrictions, write-in voting would make the primary and special primary elections more open to participation by the voters, and that this would be beneficial to our political process in Hawaii. To my regret, the bill failed to emerge from committee in the House of Representatives and thus will not become law in this session.

Although, as a matter of policy, the Office of the Lieutenant Governor shares in part Mr. Burdick's interest in establishing write-in voting as an option in Hawaii, we respectfully disagree with the conclusion that, despite our present avenues by which citizens may express their choices, the United States Constitution compels Hawaii to adopt write-in voting. As Lieutenant Governor, it is my duty to see that our election laws are faithfully carried out. Under our understanding of the election statutes, which draws upon the Supreme Court of Hawaii's decision in *Tenson v. Turner*, 40 Haw. 604 (1954), the Office of the Lieutenant Governor presently has no authority to count or consider write-in votes cast in Hawaii elections.

We are aware of, and concur in, the Attorney General's arguments to the federal courts that it is open to the courts of Hawaii to overrule the *Jenson* case on the

basis of state law, and that, in advance of a dispositive ruling on these issues by our state courts, it is inappropriate for the federal courts to enter the fray. However, until advised otherwise by our state courts, we must assume that *Jenson* is good law, and that the statutory ban on write-in voting, as described by the *Jenson* decision, continues as part of the state election law.

Accordingly, while we understand that Chief Judge Fong's declaratory rulings have not been reversed, in light of the present procedural posture of the federal litigation, absent further instruction from the courts, write-in votes will not be counted or considered in the 1988 elections. We continue to believe that the orders of the District Court will ultimately be reversed, and, because of the intrusive effects of any federal injunction mandating write-in voting in Hawaii, we will respectfully oppose any attempts to lift the Ninth Circuit's stay or to move for a new injunction before the Federal Courts.

Despite our differences with your client's positions, I wish to stress our continuing desire to work with you for legislative change in this area. Of course, in the event that a court would enjoin us to provide write-in voting, the Office of the Lieutenant Governor will take appropriate steps to comply until that order is reversed, vacated, or stayed.

Sincerely,

/s/
Benjamin J. Cayetano
Lieutenant Governor

Exhibit D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]
[Caption Omitted In Printing]

**ANSWER TO COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF.**

Come now Defendants Benjamin Cayetano, named in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, named in his capacity as Director of Elections, and answer and plead as follows in response to the Complaint for Declaratory and Injunctive Relief filed on May 17, 1988.

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. The complaint was not served in conformity with Rule 4(c), and 4(d)(6), of the Federal Rules of Civil Procedure.

THIRD DEFENSE

3. The claims stated in the complaint may not be the source of relief in this Court because of the Eleventh Amendment.

FOURTH DEFENSE

4. This Court otherwise lacks subject matter jurisdiction over the claims pleaded in the complaint.

FIFTH DEFENSE

5. The claims stated in the complaint are barred or premature by virtue of the res judicata, collateral estoppel, or law of the case effects of the judgment of the United States Court of Appeals for the Ninth Circuit in

Burdick v. Takushi, appeal Nos. 86-2689 & 86-2703, copy attached as Exhibit "A."

SIXTH DEFENSE

6. The Court should dismiss or abstain in this proceeding pending the resolution of the questions of state law identified by the Court of Appeals in *Burdick v. Takushi, supra*.

SEVENTH DEFENSE

7. The Court should otherwise dismiss or abstain for reasons of comity, federalism, restraint, or wise judicial administration.

EIGHTH DEFENSE

8. The complaint fails to name parties required to be named under Rule 19, Fed. R. Civ. P.

NINTH DEFENSE

9. Plaintiff has not shown his entitlement to equitable relief, e.g., plaintiff has failed to act with diligence within the Hawaii election system, has failed to act as a reasonable participant in the election system, has unduly delayed in bringing this action, is barred by the doctrine of laches, or is otherwise unable to demonstrate that he has no other adequate remedy and is entitled to equitable relief from this Court.

TENTH DEFENSE

10. To the extent any relief is sought against defendants in their individual capacities, such relief is barred by the doctrines of absolute, or, alternatively, qualified immunity.

ELEVENTH DEFENSE

11. Plaintiff's claims are barred by the failure to pursue adequate remedies under the Hawaii Administrative Procedure Act, and in the courts of the

State of Hawaii."

TWELFTH DEFENSE

12. Plaintiff's prayer for relief is overbroad.

THIRTEENTH DEFENSE

13. Plaintiff's claims are barred by the Tenth Amendment.

FOURTEEN DEFENSE

14. Defendants admit the allegations of paragraphs 9, 10, and 11 of the complaint.

15. Defendants deny the allegations of paragraphs 13, 14, 22, 26, 27, 28, 29, and 30 of the complaint.

16. Defendants are without information sufficient to form a belief as to truth or falsity of the allegations of paragraphs 1, 6, and 7 of the complaint.

17. With respect to paragraph 2 of the complaint, defendants admit that Benjamin Cayetano is a resident of the City and County of Honolulu, State of Hawaii, and that he is Lieutenant Governor of the State of Hawaii and the Chief Elections Officer pursuant to S 11-2, Haw. Rev. Stat. (1985). Defendants are unable to respond to the allegation that the Lieutenant Governor is "responsible for the conduct of the elections for State and Federal office" because that phrase is vague and ambiguous, and therefore deny the same. The responsibilities of state and county officials in connection with the administration of elections in the State of Hawaii is set forth in applicable statutes, rules, and administrative delegations of authority.

18. With respect to the allegations of paragraph 3 of the complaint, Defendants admit that Morris Takukshi is a resident of the City and County of Honolulu, State of Hawaii, and is Director of Elections for the State of Hawaii.

19. Defendants deny the specific allegations of paragraphs 4, 5 and 21 of the complaint but qualify that answer as follows. Defendants believe that, reasonably construed, the Hawaii election laws, as a whole, do not authorize or require the counting, consideration, or publication of so-called "write-in" votes. Defendants base this view upon, among other grounds, statements made in *Jenson v. Turner*, 40 Haw. 604 (1954), the text and purpose of the election statutes, lack of standards for counting, consideration, or publication of write-in votes, the availability of other opportunities for participation, and other factors and materials that properly inform interpretation of the statutes. Defendants nonetheless admit and assert that the United States Court of Appeals in *Burdick v. Takushi*, *supra*, properly held that, under the circumstances, the *Pullman* abstention doctrine, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), bars a federal court from entering equitable relief of the sort sought by plaintiff until the courts of Hawaii have been allowed by a proper case to give a contemporary construction to state law bearing on plaintiff's claims.

20. Defendants are without information sufficient to form a belief with respect to the truth of the precise allegations set forth in paragraph 8 and deny the same for this reason. Defendants admit that, on about June 6, 1986, plaintiff wrote a letter to Gerald Jervis, Esq., Director of Research, Office of the Lieutenant Governor, and that the letter speaks for itself. Defendants assert, further, without waiving any argument, claim, or contention with respect thereto, that Mr. Gerald Jervis mailed to plaintiff a written response on about June 24, 1986, and a further written response, including an opinion letter from Deputy Attorney General Charleen M. Aina, on about July 11, 1986.

21. With respect to paragraph 12, Defendants deny the allegations concerning the appeal in *Burdick v.*

Takushi, insofar as the Court of Appeals decided the case before this case was filed.

22. With respect to paragraph 15, Defendants are unable to respond to the allegation that "Defendant Benjamin Cayetano made a promise to the people of Hawaii that he would seek enactment of legislation providing for write-in voting" because the allegation is legally vague and ambiguous, and thus deny the same. Defendants admit and assert that, as a policy matter, the present Lieutenant Governor has supported state legislation that would, if enacted, permit the counting, consideration, and publication of write-in votes subject to appropriate standards and regulations at the primary and special primary elections.

23. With respect to paragraph 16, Defendants admit that S.B. No. 1137-87 was submitted by the request of the Lieutenant Governor, passed third reading in the State of Hawaii Senate on March 13, 1987, and passed second reading in the State of Hawaii House of Representatives on March 27, 1987, and was thereupon referred to the State of Hawaii House of Representatives Standing Committee on Finance, on March 31, 1987. Defendants also admit that, according to the records presently available, no further action was taken by the Legislature and S.B. 1137-87 did not pass. Defendants also admit that it was not legally necessary for S.B. 1137-87 to be reintroduced in the 1988 legislative session and the Legislature could have passed the bill without a new bill being introduced in both Houses. In all other respects, Defendants deny the allegations of paragraph 16 of the complaint.

24. With respect to the allegations of paragraph 17 of the complaint, Defendants deny that the Legislature, as a matter of federal or state law, has ever failed "to take appropriate steps to provide for write-in voting." Whether write-in voting is addressed by specific legislation or by an interpretation of state law is a matter sole-

ly within the competence and discretion of the state legislature, subject to the Governor's veto, and in the courts of the State of Hawaii, subject to checks on those courts provided by the Constitution of the State of Hawaii.

25. With respect to the allegations of paragraphs 18, 19 and 20, Defendants admit that in 1987 the legislature of the State of Hawaii granted authority, now codified at Haw. Rev. Stat. § 15-3.5 (Supp. 1987), that authorizes the Lieutenant Governor to comply with the federal Overseas Voting Rights Act, 42 U.S.C. § 1973ff (West Supp. 1988), but Defendants deny that the federal act or § 15-3.5 require the State to provide voters who are subject to the protections of those laws the right to cast a write-in vote as the term is used by the plaintiff here.

26. With respect to the allegations of paragraph 23, 24, and 25, of the complaint, Defendants admit that on about February 24, 1988, plaintiff wrote to the Department of the Attorney General, and that plaintiff's letter, attached to the complaint as Exhibit "A" speaks for itself, that plaintiff was provided with an interim oral response in early March, 1988, by the Department of the Attorney General, and was provided with a second interim response, in writing, by the Department of the Attorney General on April 11, 1988. A true copy of the April 11, 1988, written response, is attached as Exhibit "B." A true copy of the plaintiff's counsel's response thereto is attached as Exhibit "C." The Defendants also admit that, on April 25, 1988, the Lieutenant Governor timely responded to letters written by and on behalf of the plaintiff on February 24, 1988, and on April 8, 1988, and this response, Exhibit D to the complaint, speaks for itself. Defendants otherwise deny the allegations of paragraphs 23, 24, and 25 of the complaint.

27. Defendants deny each and every allegation of the complaint that is not admitted expressly by this Answer.

28. With respect to the complaint as a whole, defendants assert that, in light of the Ninth Circuit's disposition in *Burdick v. Takushi*, *supra*, prosecution of the instant complaint would violate Rule 11, Fed. R. Civ. P., and establishes a basis for sanctions against plaintiff under 28 U.S.C. § 1927, and 42 U.S.C. § 1988, and that Defendants are entitled to their "just costs" under 28 U.S.C. § 1919.

WHEREFORE, Defendants pray for relief as follows:

1. That this Court dismiss the complaint for want of jurisdiction, or abstain from exercising its jurisdiction, and that Defendants be granted their costs, expenses, and attorneys fees.

2. That, in the alternative, the Court should promptly certify applicable questions of state law to the Supreme Court of Hawaii pursuant to Haw. R. App. P. 13, and that Defendants be granted their costs, expenses, and attorneys fees in obtaining this order.

3. That, should the court reach the merits of plaintiff's claims, that each and every one of those claims be dismissed with prejudice, and that Defendants be granted their costs, expenses, and attorneys fees.

4. That this Court grant Defendants such other and further relief as this Court deems just and is authorized by law.

Dated: Honolulu, Hawaii, June 7, 1988.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
STEVEN S. MICHAELS
Deputy Attorney General
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,

Plaintiff,

vs.

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant
Governor of Hawaii;

Defendants.

Civil No. 86 0582

ORDER CERTIFYING QUESTIONS OF
HAWAII LAW TO THE SUPREME COURT
OF THE STATE OF HAWAII

The parties to this case have submitted a stipulation requesting the United States District Court for the District of Hawaii to certify certain questions to the Supreme Court of the State of Hawaii. The court finds good cause to certify these questions and being fully informed of the premises therefor.

IT IS HEREBY ORDERED that the Clerk of the United States District Court for the District of Hawaii shall forthwith cause the filing of the appropriate certificate, a copy of which is attached hereto as Exhibit 1, submitting the following questions to the Supreme Court of the State of Hawaii;

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election offi-

cials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

DATED: Honolulu, Hawaii, JUL 19 1988

s/s
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT
OF THE STATE OF HAWAII

ALAN B. BURDICK,	)	NO.
)	
<i>Plaintiff,</i>)	
)	
vs.	)	(USDC NO.
	)	86 0582 HMF)
MORRIS TAKUSHI, Director)	
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant)	
Governor of Hawaii;)	
)	
<i>Defendants.</i>)	
)	

CERTIFIED QUESTIONS FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF HAWAII TO THE
SUPREME COURT OF THE STATE OF HAWAII

I. INTRODUCTION

The United States District Court for the District of Hawaii has before it in the case entitled *Burdick v. Takushi, et al.*, Civil No. 86-O582, questions regarding the Constitution and election laws of the State of Hawaii that are determinative of the action, and for which there is no clear controlling precedent in the decisions of the courts of the State of Hawaii. Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court answer the questions as set forth in Part III of this certification by written opinion.

II. STATEMENT OF PRIOR PROCEEDINGS
AND STATEMENT OF FACTS

In May 1986 plaintiff Burdick notified defendants

Takushi and Waihee that he wished to cast one or more write-in votes in the September 1986 primary election and in future elections. After consulting with the State Attorney General, defendants informed Burdick that Hawaii election laws do not provide for write-ins and that such votes would be disallowed or ignored.

Burdick filed suit in federal district court claiming that in the upcoming primary and in future primaries and general elections he wished to vote for persons whose names would not appear on the printed ballot and that a ban on such write-in voting violates both the Hawaii Constitution and the United States Constitution. The district court agreed, granting summary judgment for Burdick on the federal constitutional issue. The district court issued an injunction ordering the defendants to provide for write-in voting in the 1986 general election.

The defendants appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The defendants obtained a stay pending appeal.

The appeal was argued before the court of appeals on August 13, 1986. On May 17, 1988, the court entered its opinion vacating the district court's judgment. The court of appeals remanded the case to the district court with instructions to the district court to abstain from deciding the federal constitutional issue pending a determination by the courts of the State of Hawaii whether Hawaii's law permits or requires write-in voting.

If the Hawaii Supreme Court rules that Hawaii law requires write-in voting, there will be no need to decide the federal constitutional question raised in plaintiff's complaint. Similarly, if the Hawaii Supreme Court rules that Hawaii law permits write-in voting, and if State election officials then provide for such voting, there will be no need to decide the federal constitutional question.

Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determination. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

III. CERTIFIED QUESTIONS

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

IV. CONCLUSION

Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court consider the above questions of Hawaii law and, if appropriate, answer the same by written opinion.

DATED: Honolulu, Hawaii, JUL 19 1988

s/s
UNITED STATES DISTRICT JUDGE

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

ALAN B. BURDICK,)	
)	
<i>Plaintiff,</i>)	
)	
vs.	)	Civil No. 86-0582
)	
MORRIS TAKUSHI, Director)	
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant)	
Governor of Hawaii;)	
)	
<i>Defendants.</i>)	
)	

**ORDER DENYING MOTION FOR
AMENDMENT OF CERTIFICATION ORDER**

On July 6, 1988 the parties requested that this court certify certain questions to the Supreme Court of the State of Hawaii. The court did so on July 19, 1988.

Along with their request for certification, the parties submitted a proposed certification for the court's consideration. The court declined to sign the proposed certification and instead issued its own certification. Although the court's certification departs from the parties' proposal in several respects, the questions certified are identical.

On August 1, 1988 the defendants filed a motion for amendment of the court's July 19, 1988 certification order. Defendants advance three reasons why the court should amend its certification. First, defendants argue that they obtained certain rights from plaintiff in exchange for their agreement to seek certification. These

rights are incorporated in the parties' proposed certification and the court, by issuing its own certification, deprived defendants of these rights.

Second, defendants argue that the court's certification departs from the court of appeals mandate. Specifically, defendants contend that this court may not advise the Hawaii supreme Court that, absent a change in federal law, the court will rule consistently on the federal constitutional question, if and when that issue comes before it for decision.

Third, defendants argue that the certification should be amended to assure each party an adequate opportunity to be heard in any federal proceeding that might occur after the Hawaii Supreme Court renders its decision.

DISCUSSION

Rule 13 of the Hawaii Rules of Appellate Procedure provides in part as follows:

When a federal district or appellate court certifies to the Hawaii Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the Hawaii judicial decisions, the Hawaii Supreme Court may answer the certified question by written opinion.

Defendants first argue that the proposed certification incorporates an implied waiver of plaintiff's right to contest an administrative determination not to provide write-in voting. The court's failure to submit the proposed certification unchanged therefore deprives defendants of this alleged waiver. Defendants argue that the court should not have submitted its own certification, at least not without notice and a hearing.

The court finds defendants' position to be untenable for several reasons. First, there is no evidence, aside from defendants' expansive interpretation of the proposed certification, that plaintiff actually intended to waive his right to challenge an adverse administrative decision, should such a decision become the basis for defendants' continued refusal to allow write-in voting. If plaintiff wished to waive this right, the parties should have clearly said so in their stipulation.

Second, if the parties intended to memorialize an agreement waiving plaintiff's rights in this federal lawsuit, they should not have done so by implication. Nor should they have done so in a proposed certification to be filed with the Hawaii Supreme Court. The court should not find an implied waiver of a federal claim tucked between the lines of a document intended to be filed with another court.

Third, defendants' contention that the waiver is necessary in order for the third certified question to be "determinative of the cause" is disingenuous at best. None of the three certified questions is, *by itself*, determinative, either in the parties' proposed certification or in the court's version. The determinative question before the Hawaii Supreme Court is whether Hawaii law prohibits, permits or compels defendants to provide for write-in voting. Although this could have been phrased as a single question, the parties (including defendants) chose to present it as three "yes or no" sub-questions. These three questions are merely parts of the larger determinative question that the court has certified.

Defendants' indignation over the court's decision to issue its own certification indicates that they misunderstand the certification process. Rule 13(a) does not confer any right upon parties to a federal lawsuit. That rule instead gives this court the right to communicate with the Hawaii Supreme Court. The court is therefore free to phrase a certification in whatever manner it decides

will provide the Hawaii Supreme Court with the best explanation of the issues involved. There is no precedent for the proposition that the parties may dictate the contents of that communication to a federal court.

Because certification is a right of the court, not of the parties, defendants are not entitled to notice and a hearing before the court issues its own certification, instead of that proposed by the parties. Defendants' citation to *Growney Equipment* on this issue is inappropriate. In that case, the district court imposed Rule 11 sanctions without notice or an opportunity to be heard. The court of appeals reversed, holding that due process protections were required before any governmental deprivation of a property interest. *Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc.*, 834 F.2d 833, 835 (9th Cir. 1987). Defendants in this case have no property interest in the contents of this court's communication with the Hawaii Supreme Court.

Defendants next argue that the court should amend its certification because it allegedly departs from the court of appeals mandate. Defendants object to the following portion of the court's certification:

Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determination. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

Defendants argue that this language prejudices their rights under the court of appeals mandate. Although defendants are not clear on this point, they apparently argue that they are entitled to a *de novo* consideration of the federal constitutional question. Defendants cite *Johnson v. Board of Education*, 457 U.S. 52, 102 S.Ct.

2223 (1982), in support of this claim. That case, however, stands for the proposition that, when an appellate court vacates and remands a case, the lower court *may* depart from its previous ruling if it wishes to do so. *Johnson*, 457 U.S. at 53-54, 102 S.Ct. at 2224 (when case is vacated, "doctrine of law of the case does not constrain" the district court). Therefore, neither *Johnson* nor the court of appeals mandate *requires* this court to offer defendants a second opportunity to argue the federal constitutional question in this action.

Defendants finally argue that the court should amend its certification to assure them an adequate opportunity to be heard in any federal proceeding that might occur after the Hawaii Supreme Court renders its decision. This argument effectively duplicates defendants' previous contention that they are entitled to a second opportunity to convince the court of the merits of their position on the federal constitutional issue.

Although defendants are not entitled as a matter of right to such an opportunity, the court is concerned that the Hawaii Supreme Court may regard the above-quoted language as an attempt by this court to influence its resolution of the certified questions. For this reason, the court will amend its certification order to delete the second full paragraph on page three and will replace it with the following:

For the foregoing reasons the above issues of Hawaii law are determinative of the cause within the meaning of Haw. R. App. P. 13. Should the Hawaii Supreme Court answer any or all of the certified questions, any party may transmit the same forthwith to this court and may initiate such further proceedings as are consistent with the Hawaii Supreme Court's decision and with the court of appeals mandate.

In addition, the court will make a series of technical changes in the certification order in order to make clear that this court retains jurisdiction over the federal constitutional question.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, AUG 25 1988

s/s
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,)
)
 Plaintiff,)
)
 vs.) Civil No. 88-0365-ACK
)
 BENJAMIN CAYETANO,)
 et al.,)
)
 Defendants.)
 _____)

ORDER CONSOLIDATING CASES

After reviewing the file herein and the file in *Burdick v. Takushi*, Civil No. 86-0582-HMF, which is a substantially earlier case, this court concludes that the two cases should be consolidated pursuant to L.R. 206-1. Therefore, the above-entitled case is hereby reassigned to Judge Fong and to Magistrate Tokairin. The case number shall hereafter bear the suffix "HMF."

IT IS FURTHER ORDERED that the parties are to file a status report notifying Magistrate Tokairin within ten (10) days of a disposition of the certified questions by the Supreme Court of Hawaii.

DATED: Honolulu, Hawaii, Nov 21 1988

/s/
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Captions Omitted In Printing]

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
PERMANENT INJUNCTIVE RELIEF

Plaintiff Alan B. Burdick, through his attorney Mary Blaine Johnston, moves this court pursuant to Rules 56, 57 and 65(a) of the Federal Rules of Civil Procedure, for Summary Judgment in his favor on the Complaint and for a Permanent Injunction as set forth in the proposed order attached hereto.

The Motion is based on the Memorandum of Law and Exhibits attached hereto and the pleadings and files herein.

DATED: Wailuku, Maui, Hawaii,
February 8, 1990

/s/
MARY BLAINE JOHNSTON
ALAN B. BURDICK
Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[Captions Omitted In Printing]

AFFIDAVIT OF ALAN B. BURDICK

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ALAN B. BURDICK, being first duly sworn on oath deposes and says that:

1. I am the Plaintiff and attorney pro se in this case.
2. At the end of May, 1986, I began an inquiry as to whether or not voters in the 1986 election would be able to write in the names of candidates.
3. I contacted Defendant Morris Takushi, the Director of Elections, who told me that he interpreted the lack of an express statutory authorization to allow write-in votes as a prohibition on write-in voting.
4. I next spoke with Gerard Jervis, Director of Research in the Lieutenant Governor's office, and asked him if the Lieutenant Governor's office would change its policy against write-in voting.
5. On June 6, 1986, I wrote to Mr. Jervis repeating my request and transmitted copies of two court cases that I believed would persuade the Lieutenant Governor's Office of the legal impropriety of its position.
6. On June 24, 1986, Mr. Jervis wrote me stating that the question had been referred to the Attorney General's office.
7. In July, 1986, I received a response from Mr. Jervis. He included a letter that he had received

from the Attorney General's Office in which a deputy attorney general stated there was no reason to change the policy to allow for write-in voting.

8. I filed the Complaint herein on September 11, 1986, and moved in September, 1986 for Summary Judgment and Preliminary and Permanent Injunctive Relief, which motion was granted by this Court by way of an Order entered on September 29, 1986.
9. The Court reaffirmed its Order on October 8, 1986 in response to the State's Motion for Stay Pending an Appeal to the Ninth Circuit Court of Appeals.
10. The State appealed the Decision to the Ninth Circuit Court of Appeals.
11. In May, 1988, the Ninth Circuit Court of Appeals issued a decision stating that this Court should abstain from holding that Hawaii's election laws are unconstitutional as the issue of whether the laws precluded write-in voting was an undecided question of state law. (A true and correct copy of the Ninth Circuit Decision is attached hereto as Exhibit A.)
12. In May, 1988, anxious because another election was coming up and the Ninth Circuit had not yet rendered a decision, I filed a new Complaint in the U.S. District Court, (*Burdick v. Cayetano*, Civil No. 88-0365). All activity in this case was stayed by agreement of the parties pending the outcome of the Hawaii Supreme Court's ruling.
13. By stipulation of the parties the state law issues were certified to the Hawaii Supreme Court.
14. On July 21, 1989, the Hawaii Supreme Court entered a decision holding that the state election laws did not permit write-in voting and that such provision did not violate the Hawaii Constitution. (A true and correct copy of the Supreme Court decision is attached hereto

as Exhibit B.)

15. It is once again an election year and I am once again confronted with the inability to vote for a candidate of my choice if no one I want to vote for becomes a candidate pursuant to Hawaii's election laws.

16. I have no indication that the Election Officials will permit write-in voting and am unaware of any proposed legislation to change the law to provide for write-in voting.

17. I expect that in the 1990 elections, as in the 1986 and 1988 elections, and in elections in the future I will most likely not wish to vote for someone whose name is printed on the ballot. In such elections, I will regard the inability to vote for a person who is not a candidate printed on the ballot as a violation of my rights as a voter and citizen.

18. Unless this Court grants the relief requested, i.e., to hold that Hawaii's Election laws are unconstitutional and that State officials are required to provide for write-in voting, my constitutional rights will continue to be violated and I will be irreparably harmed.

FURTHER, AFFIANT SAYETH NAUGHT.

s/s
ALAN B. BURDICK

[February 5, 1990]
[Jurad Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,) Civil No. 86-0582
Plaintiff,) -HMF

vs.)

MORRIS TAKUSHI, Director)
of Elections, State of Hawaii;)
JOHN WAIHEE, Lieutenant)
Governor of Hawaii;)
Defendants.)

ALAN B. BURDICK,) Civil No. 86-0365
Plaintiff,) -HMF

vs.)

BENJAMIN CAYETANO,)
in his individual capacity as)
Lieutenant Governor of the)
State of Hawaii; MORRIS)
TAKUSHI, Director of)
Elections, State of Hawaii,)
Defendants.)

[PROPOSED] ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND
PERMANENT INJUNCTIVE RELIEF

The Motion of Plaintiff Alan B. Burdick for Summary Judgment and for Permanent Injunctive Relief was heard by this Court on March 26, 1990, before the Hon-

orable Harold M. Fong.

The Court finds that there are no facts in dispute. Hawaii's election laws, as decided by the Hawaii Supreme Court in a decision entered in Appeal No. 13157, expressly preclude write-in voting. The Court finds Hawaii's election laws which prohibit write-in balloting constitutes an infringement on the First and Fourteenth Amendments rights guaranteed by the Constitution of the United States of America. Further, such constitutional infringement on Plaintiff's voting rights is a violation of Plaintiff's civil rights pursuant to 42 U.S.C. 1983.

Further, the Court holds that the rights of Plaintiff and other voters infringed on by Defendants' present policies regarding write-in balloting is of serious enough magnitude to warrant the issuance of an Order Granting Permanent Injunctive Relief.

The Court therefore orders as follows:

1. Summary Judgment in favor of Plaintiff is entered and Judgment is entered herein declaring that Hawaii's elections laws violate Plaintiff's constitutional rights by failing to provide for the casting, counting and reporting of write-in votes.

2. Defendants Takushi and Cayetano are hereby enjoined from refusing to provide for write-in balloting. Further, they are ordered, by the primary election to be held in 1990, to:

1. Provide adequate spaces on the ballots for write-in votes clearly marked as being for such votes. Where a single candidate is to be elected to a given office, one line obviously suffices. Where multiple candidates are chosen (as for example in the election for the State Board of Education), the lines for write-in candidates must equal the number of positions to be filled.

2. Count all write-in votes and give these votes

all the same legal effect as other votes.

3. Publish, in all reports of election results, the names of each write-in candidate who has received votes and the number of votes he or she has received.

4. Inform the public, in conspicuous language in all voter-information materials, that they have the right to cast write-in votes, and that their write-in votes will be counted and published, just like all other votes.

5. Instruct all election officials and workers to advise voters that they may cast write-in votes and that such write-in votes will be counted, published and shall have the same legal effect as all other votes.

3. Plaintiff will be awarded attorney's fees and costs pursuant to 42 U.S.C 1988 upon approval of his application for fees and costs by this Court.

DATED: Honolulu, Hawaii, _____

JUDGE OF THE UNITED STATES
DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[Captions Omitted In Printing]

**DEFENDANTS' COUNTER-MOTION FOR
SUMMARY JUDGMENT AND CONDITIONAL
COUNTER-MOTION FOR STAY**

Come now Defendants Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii, Defendants in No. 86-0582, together with their successors in office, and Defendants Benjamin Cayetano, in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, Director of Elections of the State of Hawaii, Defendants in No. 88-0365, and move this Honorable Court to enter summary judgment in their favor as to each and every claim set forth in the complaints in these consolidated actions, or such judgment in their favor as to each claim as to which they are entitled to judgment.

Without waiving any rights to contest any relief that is entered against them, Defendants conditionally move this Court, should this Court, in any manner, issue an injunction directed to Defendants, or any of them, to stay said injunction pending the filing of a timely appeal to the United States Court of Appeals for the Ninth Circuit within 10 days after issuance of any injunction, and, should the Court of Appeals affirm an injunction directed to Defendants, pending application for a writ of certiorari under 28 U.S.C. § 1254, or for a stay pending appeal only to the Court of Appeals for the Ninth Circuit, or for a temporary stay of not less than 30 days so as to permit Defendants to seek from the United States Court of Appeals for the Ninth Circuit, or from the Circuit Justice, a stay pending appeal.

This motion is made pursuant to Fed. R. Civ. P. 7, 12, 56, 62, Fed. R. App. P. 8, Local Rule 220, Ninth Cir-

cuit Rules 27-2 and 27-3, the statutes and laws of the United States and of the State of Hawaii, the attached memoranda and accompanying declarations and exhibits, such matters as may be subject to judicial notice, and the record in these consolidated actions, C.A. Nos. 88-2689 & 86-2703 (9th Cir. 1988), and No. 13157 (Haw. 1989).

Dated: Honolulu, Hawaii, April 19, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[Captions Omitted In Printing]

DECLARATION OF DWAYNE YOSHINA

I, Dwayne Yoshina, pursuant to 28 U.S.C. § 1746, declare:

1. I am currently the Deputy Executive Officer for Elections in the Office of the Lieutenant Governor, State of Hawaii. In that capacity, I am responsible for all phases of elections operations that are within the jurisdiction of the Lieutenant Governor, in his capacity as chief election officer of the State of Hawaii. My statements herein are based on personal knowledge.

2. The date of the 1990 primary is September 22, 1990. Under federal guidelines, absentee ballots for overseas voters for the primary and general election must be mailed no later than 35 days before each election. Printing of the primary ballots (estimated in excess of 2.2 million cards for all races likely to be at issue) will commence July 28, 1990, after the July 24, 1990, filing deadline. Printing of the approximately 2.3 million ballot cards for the 1990 general election will commence September 14, 1990.

3. Based upon our experience in attempting to comply with this Court's injunction in 1986, it would be feasible to have a so-called "ballot envelope" be used in Hawaii's primary and general election, if this Court orders write-in voting at this time. However, this conclusion is subject to at least the following qualifications anticipated at this time.

4. First, it will cost approximately \$50,000 to purchase the ballot envelopes, presumably from a mainland printer. To comply with public bidding laws, Defendants must know whether to begin the procurement process no

later than mid-May, otherwise additional cost may be incurred by reason of having to waive the bidding rules under compulsion of federal law.

5. Second, it is doubtful write-in voting at the primary can be integrated with Hawaii's election calendar, insofar as a significant number of write-in votes require possibly up to a month or more to count, even with specially hired workers. Particularly in light of the requirements of the Overseas Voting Rights Act, if, in a close race, write-in ballots were determinative at the primary, it would likely be impossible to meet the deadlines for mailing the ballots required by the United States.

6. Third, given the absence of a federal order, and the presently controlling decision of the Supreme Court of Hawaii, there is no money in the budget for the supplies or staff needed to implement write-in voting at the primary or general election.

7. Fourth, delays following write-in voting at the general election can be expected to delay election results up to a month or more if write-in voting is required at the November election.

8. Fifth, while, if write-in voting is judicially ordered, every effort would be made to preserve the secrecy of the ballot, inevitably the presence of write-in voting will lead to risks of breaches of confidentiality of the voters ballot choices.

9. Sixth, if it is not clear whether a candidate is nominated by obtaining a plurality of votes at the primary by reason of write-in votes, timely placement of names on the general election ballot will likely be impossible. This is especially true in this year, as the gap between the primary and general election is the shortest gap allowed by law, i.e., 45 days. Given our present contract with the ballot printer, any changes in the printing schedule may lead to penalties against the State.

10. Seventh, write-in voting will require additional changes to the ballot counting computer programs which are purchased from an independent contractor. It is uncertain whether these adjustments can be made in time to comply with the State's requirements that the system be functioning in time.

11. Eighth, write-in voting will also require changes to the ballot preparation programs. It is estimated the revisions may take between 6 to 8 weeks. It is uncertain whether these adjustments can be made under the existing time lines.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Honolulu, Hawaii, on April 19, 1990.

s/s
DWAYNE YOSHINA

[Deposition of Alan B. Burdick (August 26, 1988), set forth as "Exhibit D" to Declaration of Steven S. Michaels, submitted in support of Defendants' Counter-Motion for Summary Judgment]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[Caption Omitted In Printing]

DEPOSITION OF ALAN B. BURDICK, Pro Se
Taken on behalf of Defendants at the law offices of
Johnston & Day, 222 Merchant Street, Honolulu, Hawaii
96813, commencing at 1:42 p.m., on August 26, 1988,
pursuant to Notice.

BEFORE:

LAURIE M. SAVAGE, CSR 264
Registered Professional Reporter
Notary Public, State of Hawaii
Ralph Rosenberg Court Reporters, Inc.

APPEARANCES:

For Plaintiff: MARY BLAINE JOHNSTON, ESQ.
Johnston & Day
222 Merchant Street
Honolulu, Hawaii 96813

For Defendants: STEVEN S. MICHAELS, ESQ.
Deputy Attorney General
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

INDEX

EXHIBITS FOR IDENTIFICATION

PLAINTIFF'S EXHIBIT 1:

Letter to Steven Michaels, Esq., from Mary Blaine

Johnston, dated August 23, 1988

PLAINTIFF'S EXHIBIT 2:

Page A-10, Wednesday, July 20, 1988, Star-Bulletin.

DEFENDANTS' EXHIBIT 1:

Notice of Motion; Motion For Amendment of Certification Order; Memorandum In Support of Motion For Amendment of Certification Order; Declaration of Counsel; Proposed Order; Certificate of Service.

ALAN B. BURDICK, called as a witness at the instance of the Defendants, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

(Disclosure was presented to Counsel.)

EXAMINATION

BY MR. MICHAELS:

Q. Mr. Burdick, my name is Steven Michaels. I'm the deputy attorney general assigned to this case, and we do appreciate you appearing today pursuant to the notice of deposition that was served upon you yesterday.

This notice was served on you yesterday pursuant to an agreement to an agreement with your counsel that this was not an inconvenient time for you, and I was wondering whether you were aware of that agreement and whether you agree that this is the case.

A. A couple of things. First, I understand that this deposition is being noticed in both Burdick versus Takushi and Burdick versus Cateyano. Therefore, we should be speaking of these cases rather than this case.

This time is no more inconvenient than any other time. I consider the deposition to be an inconvenience, an imposition. The matters that you intend to go into are irrelevant to this lawsuit, and I would also point out

that I am here not only in my capacity as plaintiff in these two lawsuits but also as pro se co-counsel for myself.

And I would like to ask Mimi Johnston, who is my attorney in these cases, to supplement this statement.

MS. JOHNSTON: Yes. Before we go on, I just want to put on the record, as I've already written to you, Steve, the purpose for which you've stated you wanted to make the deposition, which you mention at page 22 of your reply memorandum in support of motion for amendment of certification order filed with the federal court in the Burdick versus Takushi case on August 19th, is, quote, defendants are entitled to take the plaintiff's deposition to show that even under the standards of Justice Marshall's dissent in Munro -- that's M-u-n-r-o -- plaintiff was not impermissibly burdened by ballot access restrictions, end of quote.

As we have continually taken the position, as Judge Fong said in his decisions, this is not a ballot access case; it's a voter's rights case. That's the way our complaint is framed.

You choose to continue to try to reframe it to an issue that is not relevant. That is why I wrote you on August 23rd and said that we feel this deposition is totally irrelevant, that rather than move for a protective order, which would just contribute to the ongoing delay that you have managed to effect so far, we would agree to this deposition on two conditions, one, that we will be seeking attorneys' fees both from Mr. Burdick and me, and, two, we intend to move for a Rule 11, sanctions for the taking of it.

I would like to have marked and put in the record a copy of my August 23rd letter to you and, again, express the mention that even though we are willing to appear for the depo and have it taken, that we waive no rights as to challenging the relevancy, the purposes, and the motives behind this deposition.

THE WITNESS: Excuse me. We'd like to make Mimi's letter of August 23rd Plaintiff's Exhibit 1 to this depo.

(Plaintiff's Deposition Exhibit No. 1 was marked for identification.)

MR. MICHAELS: I have no objection to reserving all objections to this proceeding. That is the understanding that I had when we agreed to it. We can litigate all of those matters later. Obviously we would oppose the grounds that you have set forward.

We do believe that under the general First Amendment Doctrine it's relevant and material. Even if our overarching theory under Munro versus Socialist Workers Party does not pan out, it is relevant and material to know whether and how in fact a particular plaintiff or a group of persons who are making a First Amendment challenge to the restriction on the right to cast votes, whether those persons are burdened in fact by the electoral system.

And I do have a short number of questions. I don't anticipate that this will take much time relevant to that issue. But, again, I'm not seeking and I don't think it would be productive to argue back and forth about the legal issues behind this. I'm just here to get some very basic facts, and if we can go forward with that, that would be my understanding on which we're going forward.

MS. JOHNSTON: Ask away.

THE WITNESS: Let me just add one final preliminary point. We will expect -- I would say first that my understanding was that you were going to make this a short deposition, no more than two or three hours. Consequently, I expected that there might be in excess of a hundred questions.

But we expect that there will be questions that are objectionable both for relevancy reasons and for reasons

that I will broadly characterize as a political privilege objections based on inquiries into my political beliefs, my memberships, associations, activities, and anything else that relates to an inquiry into my ideas.

I would consider any such inquiry to be violative of my rights under the United States Constitution and United States Laws, including, but not limited to, the Civil Rights Act, as well as my right to cast secret vote as guaranteed by the Constitution of the State of Hawaii and by the Election Laws of the State of Hawaii, as well as by Rules of Evidence.

So for the purposes of shorthand, I may simply say or my attorney may simply say political privilege objection, and that shorthand is intended to refer to what I've just mentioned.

MR. MICHAELS: We appreciate the nature of this area, and I will try my best not to infringe on any right that we have clear knowledge of.

We do understand that this is a federal question case to which the privilege as set forth and Hawaii law are not automatically applicable. We have done some research into this area and we are sensitive to your concerns, Alan.

If I could just start out, I think that we can get the show on the road and get through the short list of questions that I have.

BY MR. MICHAELS:

Q. Have you ever been deposed before?

A. No, I have not.

Q. And you have never appeared before as a plaintiff in a case?

A. That is not correct.

Q. So you have been a plaintiff in other cases but you were not deposed in those cases?

A. That is correct.

Q. You're aware that your statements today are under oath and if relevant, admissible, and material could be used in the litigation to help sustain our defenses or in other ways relevant to the case?

A. Yes, subject also to other evidentiary exclusions.

Q. You are an attorney licensed under the laws of Hawaii?

A. That is correct.

Q. And how long have you been licensed in Hawaii?

A. Since approximately August of 1982 -- actually I think early September 1982.

Q. And how long have you been a resident of Hawaii?

A. Since May 1982.

Q. And you are familiar with the statutes of the state of Hawaii that relate to elections?

A. I think the question is vague and ambiguous as to what you mean by the word familiar.

Q. Have you read the statutes that are contained in Hawaii Revised Statutes that relate to the conduct of the primary election and the general election?

A. On occasions, primarily two years ago when I first brought the lawsuit entitled Burdick versus Takushi, I read certain of the election statutes.

I have not read them all. I have not refreshed my recollection as to them. I have glanced at a couple of them this morning, but it would be unfair to say that I have a working familiarity with the election laws at this moment.

Q. I appreciate that. They can be complex and difficult to remember.

Mr. Burdick, in your complaint in the Burdick versus Takushi case, is it true that you made mention of the fact that in consequence of the persons who did and did

not submit petitions to be placed on the primary ballot, you believed that you were limited in your choice of people that you could vote for at the primary stage of the election?

MS. JOHNSTON: Just to clarify, are you asking him what the complaint says? Because if you are, I'm going to object. I think the complaint is part of the case file. It certainly speaks for itself. If you have a particular part of the complaint you want to refer him to, you can ask him that.

MR. MICHAELS: Maybe I should clarify that point.

MS. JOHNSTON: Yes, if you would.

BY MR. MICHAELS:

Q. Is it true that today you claim, assuming this litigation goes forward, that as a consequence of the persons who filed and did not file ballot petitions with the lieutenant governor for nomination through the primary system, that your choice was impermissibly limited at the primary stage?

A. Are you referring to the 1986 election?

Q. I'm referring to the 1986 election.

A. In the 1986 election we had of course a large number of races. I made specific mention of the State House of Representatives District in which I reside because there was only one candidate, who happened to be a candidate in the Republican primary, and there was no Democratic candidate.

I will not tell you which primary ballot I took, whether it was Democratic or Republican or independent, and to that extent I cannot answer your question because it would impermissibly delve into a privileged area.

I would say, however, that the point of my complaint, and that's paragraph seven of the complaint, was that there was only one candidate destined to appear on

the general election ballot.

And my understanding was that by virtue of the practices of the Office of Lieutenant Governor at the time, and I do not know whether it is expressly authorized by statute, the one candidate who filed was deemed to have been elected as of the closing of receipt of petitions for the primary even though it was at least two months before the primary election and three or four months before the general election.

No votes had ever been cast, but this man was deemed to have been reelected, and I objected to that.

Q. When you say pursuant to the practice of the Office of Lieutenant Governor, did you ever become aware of a certificate of election being issued to that candidate prior to the time of the primary election?

A. No, I did not. The newspapers in 1986 would give lists of who is running in the primaries and so on, and I happen to have in front of me a copy of the Honolulu Star-Bulletin for Wednesday, July 20, 1988, page A-10. This is 1988, the one I have here.

In 1986 I recall the newspaper, both the Advertiser and the Star-Bulletin, had very similar kinds of charts showing who's running in what race, and the description in the Advertiser and the Star-Bulletin said that where the candidates are unopposed they are deemed elected.

I assumed that that was something they had gotten from the lieutenant governor's information office. The Star-Bulletin article that I just mentioned from July 20th of this year is a little more careful.

However, let me just read this. "Nineteen unopposed state lawmakers and five county candidates will be on the primary election ballot even though they are automatically elected because of lack of opposition. Three candidates for state Senate and 16 for the state House are unopposed." That's merely a clarification of the first sentence. Now I'll continue with the quote. "These winners are listed in capital letters."

So there it is. They are automatically elected be-

cause of lack of opposition. This is July 20th, 1988, almost two months before a single vote has been cast in the primary election and four months before the general election. These people are automatically elected, according to the Star-Bulletin, and I assume the Advertiser has similar language.

MS. JOHNSTON: I would like to have this marked and put in as an exhibit to the deposition.

THE WITNESS: That's fine. Plaintiff's Exhibit 2 will be this page. I'm sure we can stipulate to it being xeroxed and put in as perhaps several sheets of xeroxed paper.

(Plaintiff's Deposition Exhibit No. 2 was marked for identification).

BY MR. MICHAELS:

Q. The document that you've just referred to is of course a statement in the newspaper; is that correct?

A. That is correct, and undoubtedly it's hearsay.

Q. An undoubtedly it's hearsay and it's not admissible for purposes of any admission by the Office of Lieutenant Governor?

A. I realize that, but it certainly is a piece of information that has been publicly distributed, and I am unaware of any letter to the editor in either newspaper by any person associated with the Office of Lieutenant Governor to disabuse people of the information conveyed by the newspaper.

Therefore, the public has been told that these nineteen unopposed candidates have been automatically elected two months before the primary and four months before the general election.

Q. Mr. Burdick, can you tell me which State Senate District you live in, to the best of your knowledge?

A. It is the State Senate District currently repre-

sented by Mary George. The number is ten.

Q. And have you consulted with the lists published by the Office of Lieutenant Governor as to whether Senator George faces any opposition in her own primary or whether in fact there is a candidate running in the Democratic primary?

A. I have not consulted directly with the Office of Lieutenant Governor. I've relied on the newspaper and the sign waving that I see. There are two Democrats who are running, according to the newspaper article, one Bud Pinkosh and one Eric Poohina.

Q. So that there are candidates opposing Senator George on the Democratic side; is that correct?

A. As far as I know, that is correct.

Q. And based on your knowledge, one of those two Democrats will go on to face Senator George in the November election, whichever one wins; is that correct?

A. Assuming that neither one of them withdraws or dies and assuming that one of them is elected and assuming that there are no write-in votes that are allowed to be cast and counted, then one of those two will presumably be the Democratic candidate in November against Mary George, yes.

Q. Did you yourself, and again without specifying which party are on behalf of which candidate, did you yourself sign any petition that would have under state law been used by a candidate for purposes of placing that person's name on the primary ballot for 1986, to the best of your recollection?

A. For which political office?

Q. Well, why don't we go down through the offices that were up in 1986.

A. I will make it simple. I have not signed a petition for any person seeking to be a candidate of the Democratic or Republican primary -- party in a primary

election in 1986 or in 1988.

Q. Can you tell me whether you signed any petitions on behalf of any other person in any other party?

A. I refuse to answer that question on the grounds that it invades my political privilege.

Q. Did you ever sign any petition that was being circulated for the purposes of registering a new party in the state of Hawaii pursuant to the provisions of Chapter 11 of the election statutes? And you can refer to Chapter 11, Section 11-62, if you want to see the provision to which I'm referring.

A. I assert the same objection.

Q. And I assume that if I asked specifically for an answer, you will absolutely refuse to answer those questions on advice of counsel?

MS. JOHNSTON: Well, when you say those questions, I don't know what you're talking about.

MR. MICHAELS: Okay. I will ask specifically of counsel whether you are instructing the witness not to answer the question whether Mr. Burdick himself has ever signed a what we call 11-62, 63 party petition to place a party on status as a political party in Hawaii.

MS. JOHNSTON: Could we take a slight break so that I could talk with my client?

MR. MICHAELS: Sure.

(A recess was taken.)

MS. JOHNSTON: Could you read back the last question, please.

(Reporter read the pending question.)

MS. JOHNSTON: First of all, I'm going to object to the question on the basis of relevancy. Again, you're asking questions that have to do with ballot access and nothing having to do with voters' rights.

Second, to the extent that the question seeks any information as to specific political candidates or parties that Mr. Burdick may have in some way been associated with or supported by signing of any such petitions, we'll object on the basis of the political privilege he's already mentioned, but he may go ahead and provide a further answer.

THE WITNESS: Let me also add that our objections relating to ballot access apply to the line of questions that you've asked me regarding signing of petitions for candidates in either the Democratic or Republican primary.

Without waiving any of the objections, I would say that I have on occasion signed petitions for ballot access of various persons and -- of various candidates and political parties. I will not identify any of them.

To the extent that those petitions have been submitted to the appropriate governmental authorities, my signature would be a matter of public record.

I would point out that I believe in easy ballot access for candidates but that that belief is supplemental to, and in no way substitutes for, my belief that voters have the right to refuse to vote for any candidate on the ballot no matter how that candidate got on the ballot, whether that candidate is a candidate of one of the major political parties or a so-called third-party candidate or an independent.

The voters have the right at any time to vote for anyone who -- regardless of whether that person is a listed candidate on the ballot or not.

BY MR. MICHAELS:

Q. Do you know whether any of the petitions that you have signed were successful in placing a candidate or an issue on the ballot?

A. Are we getting into political issues now or just candidates?

Q. Why don't we just stick to candidates.

A. I frankly cannot tell you. I do not know whether those specific petitions have been successful or not.

Q. Did you sign any such petitions in 1986?

A. I believe so.

Q. And you don't know whether they were successful or not?

A. I do not know.

Q. Can you tell me which petitions you did sign in 1986?

A. I told you before that I would not answer that question on the grounds of political privilege. I also object to the question on the grounds of relevance.

MS. JOHNSTON: And I will add that I'm instructing my client for those two reasons to not answer that question.

Q. And I assume that your answer would be the same with respect to -- well, let me first ask the question. Did you sign any petitions in 1988?

A. Any such petitions --

Q. Petitions for candidates in 1988.

A. I believe so, but I'm not sure.

Q. I assume if I asked you the question as to on behalf of which candidates you signed, that we would have the same objection and instruction not to answer?

A. That is correct, the same objections, both objections.

MS. JOHNSTON: Instead of assuming, why don't you just ask the question so we keep the record really clear.

Q. Have you ever yourself circulated petitions on behalf of a candidate?

A. I object to the question on the grounds of rele-

vance.

Q. I'm simply trying to establish whether you as a person in our political system are familiar with how difficult it is to obtain signatures.

MS. JOHNSTON: Well, I'm going to repeat the objection. Steve, how is that relevant to our lawsuit?

THE WITNESS: I think it's also an argumentative question. It assumes facts not in evidence.

MR. MICHAELS: Are you going to instruct your client not to answer the question of whether he's ever circulated any petitions?

MS. JOHNSTON: Yes, I'm going to instruct him that. It's totally irrelevant to the lawsuit.

THE WITNESS: This lawsuit is about voters' rights, the right of a voter in the voting booth to choose to vote -- to cast his vote or her vote for the candidates listed or to choose not to cast a vote for the candidates listed and to cast a vote for someone else.

It has nothing to do with the circulation of petitions for candidates, whether they be successful or unsuccessful.

BY MR. MICHAELS:

Q. Do you know whether other than the one candidate that you referred to with respect to 1986, whether there were any other races in which the November ballot in which you were entitled to vote for had an unopposed candidate?

A. To make it really clear, in the 1986 election Mr. John Medeiros, who is a Republican candidate for the State House of Representatives in District No. 19, was unopposed. I am not sure at this time whether there were other persons who were unopposed in the November election.

There were some candidates, I believe, who may

have been unopposed in the Board of Education election, and I frankly do not recall whether the Board of Education, which is a nonpartisan election, was September or November.

Q. Do you know whether the Board of Education election is for at-large seats and so that if there are more candidates than seats no one is technically unopposed?

A. Would you repeat that question?

Q. I'll break it up into two questions. First, do you know whether the Board of Education elections are held on an at-large basis?

A. They're not held on an at-large basis. They're held by a mishmash of Oahu at large and then some Oahu districts, but you get to vote for people in districts outside of where you reside.

In other words, candidates must be from certain areas on Oahu but they're elected countywide. It's an absurd system.

Q. You're not challenging that system in this lawsuit?

A. Not in the present lawsuit, either of the present lawsuits.

Q. Do you know how many signatures it takes to get a person on the primary ballot for, say, a member of the State House?

MS. JOHNSTON: I'm going to object to that question on the basis of relevancy.

MR. MICHAELS: And are you instructing the client not to answer that question?

MS. JOHNSTON: No, I did not instruct him not to answer.

BY MR. MICHAELS:

Q. Okay. Answer that question.

A. I am sure of the exact figure, but I think it's somewhere between ten and twenty people.

Q. And do you know the number of signatures required to get a person on the ballot for a statewide office or for the office of the United States Representative to --

MS. JOHNSTON: Same objection.

A. I don't know the figures for such offices.

Q. Have you ever at any time circulated petitions in the state of Hawaii either for a candidate or for a political party?

MS. JOHNSTON: I'm going to object on the basis, one, relevancy; two, political privilege.

MR. MICHAELS: And are you instructing him not to answer?

THE WITNESS: I'm refusing to answer.

MS. JOHNSTON: Okay. And I will concur with his refusal.

BY MR. MICHAELS:

Q. You've been a resident of Hawaii since about 1982?

A. Since May of 1982.

Q. And you've had a chance to observe the customs and practices of politics in Hawaii for over six years?

A. Yes.

Q. And generally the weather in Hawaii is of a tropical nature and we don't have snow or other kinds of conditions to keep people necessarily inside?

MS. JOHNSTON: Wait, wait, wait.

THE WITNESS: Let the record show laughter by --

MS. JOHNSTON: Yes, right. Is that a question,

first of all?

MR. MICHAELS: That is a question.

MS. JOHNSTON: I object. It has no relevancy. But certainly do answer the question, Alan.

THE WITNESS: Hawaii has lovely weather. That's one of the reasons I live here.

MR. MICHAELS: Based on your knowledge as a resident of the state of Hawaii have you any opinion as to how long it would take to get ten to twenty signatures?

MS. JOHNSTON: I'm going to object on the basis of relevancy.

THE WITNESS: And my opinion is not relevant, either.

BY MR. MICHAELS:

Q. So you have no opinion?

A. For the sake of proceeding with this deposition, I am sure it is quite easy to get somewhere between ten and twenty signatures on petition.

It is not relevant because my lawsuit is based on the right of a voter to reject the names of all the listed candidates on the ballot and vote for someone else on the basis of anything, including events that may have occurred after the date of closing for the receipt of primary petitions, after the date of a primary, or anytime in between.

Q. Okay. Maybe we can speed this all up by saying that I'm asking you a question. Is it the premise of your lawsuit that no matter how easy it is for a person to get their printed name on the ballot --

A. Their name printed on the ballot.

Q. Their name printed on the ballot, and no matter how late in the season the deadline falls for a person

getting their name on the ballot, a voter has a right under the United States Constitution to cast a vote for someone who -- notwithstanding the lack of any limits upon a person getting their name printed on the ballot -- the voter has the right to cast their vote for somebody else if they want to?

A. That is correct, because my lawsuit is a voters' rights lawsuit and is not a ballot access lawsuit.

And I believe that that point has been made very clearly in our briefs and memoranda throughout the course of *Burdick versus Takushi* and as set forth also in the complaint in *Burdick versus Cayetano*.

Q. And so it would be your position that if a state provided unlimited rights in candidates to have their names printed on the ballot, that notwithstanding that unlimited access or right in a candidate to have their name printed on the ballot, that a voter, such as yourself, would have the unlimited right under the United States Constitution to cast a write-in vote for someone's name who is not on the printed ballot either at the primary or at the general election?

A. That is correct. It's operating on the basis of a hypothetical, but that is correct. The basic point is that this is a voters' rights lawsuit.

Q. Do you yourself know of any third-party candidates, and by third-party candidates I mean candidates other than those in the Democratic or Republican parties, who were on the ballot in 1986?

A. For what offices?

Q. For any office.

A. There were Libertarian candidates, I believe, in a number of the offices where I was able to cast my vote. Whether there were any independents or other third-party candidates, I cannot recall at this moment. I'd object to the question on the grounds of relevance.

Q. But you admit that there were Libertarian party

candidates in 1986?

A. I don't know if the word admit is a correct word in this situation. I object again to the question -- to all of these questions on the grounds of relevance.

There were. It's a matter of public record. There was a Libertarian candidate I'm pretty sure for the United States House of Representatives. If Inouye was running for reelection that year, which I believe he was, there was, I believe, one running against him for the United States Senate.

Q. Do you know whether there were any third-party candidates running in 1984, if you recall?

MS. JOHNSTON: I'm going to object on the basis of relevancy.

A. There were third-party candidates running for President of the United States as well as U.S. House of Representatives. There was at least -- there was a Libertarian candidate for the U.S. House of Representatives.

I don't know about any other third-party candidates or independent candidates. I'm sure there was a Libertarian candidate for one or more of various other offices.

Q. And you would make the same statements with respect to 1982?

MS. JOHNSTON: That there were or were not?

MR. MICHAELS: That there were candidates of third parties running for various offices in 1982.

THE WITNESS: I again object to the question on the grounds of relevance. There was, I believe, also a Libertarian candidate for the United States House of Representatives. Whether there were other third-party candidates or any independent candidates in the election district where I voted, I do not recall.

I'd also interpose the best evidence objection. These are matters of public record, and I'm sure that since you

are representing the Office of Lieutenant Governor you could find out this information definitively, if you wish, just by consulting your client.

MR. MICHAELS: Mr. Burdick, just to clarify the basis of your lawsuits in the two different election years, is it your position -- let's just take the hypothetical of Senator George this year.

She faces one of the two Democrats who are running in the Democratic primary, assuming that those Democrats go head-to-head in September.

I'm not asking whether you would want to do this, but is it the premise of your lawsuit that a voter could vote for the Democrat that lost in the Democratic primary as a write-in candidate at the November election?

MS. JOHNSTON: I'm going to object, one, lack of clarity of the question. When you say could vote, what do you mean?

BY MR. MICHAELS:

Q. I would like to know whether under the legal theory that you are advancing in your case -- I don't recall the two names of the persons running.

A. They are Bud Pinkosh and Eric Poohina.

Q. Okay. My hypothetical is as follows. Let's say that we have the Democratic primary in September and Mr. Pinkosh is the loser in that primary.

Mr. Burdick, you're claiming that this is a voters' rights case and you want to establish some rights in the voters --

A. Get them reaffirmed.

Q. However one chooses to characterize it. You would like to see a voter have the right to vote for Mr. Pinkosh at the general election. Is that correct or incorrect?

A. As a specific example, yes. And I consider any statute that purports to protect the so-called integrity of

political parties by banning write-in voting for sore losers, so-called, such as in this hypothetical, Mr. Pinkosh, as a violation of my constitutional rights.

I further believe that Hawaii's absolute ban on write-in voting is overbroad, even if it were constitutional, which I disagree with, that the government can tell me who I may and may not vote for by saying that I may not cast a write-in vote for a loser in a primary when the general election occurs.

To the extent that statutes have been upheld that prevent ballot access by a primary loser, I do not believe that those court decisions go so far as to prevent voters from exercising their constitutional rights to vote for whomever they please, whether or not those people are on the ballot.

Q. Mr. Burdick, to test another hypothetical, it's your petition that a voter has a right to vote for someone notwithstanding the fact that that person has never in any way registered with the Office of the Lieutenant Governor, has never obtained ten to twenty-five signatures -- whatever the requirement is -- and has never filled out the requirements for sworn statements as to their qualifications and so on?

A. Voters have the right to vote for anyone they please regardless of whether that person has -- made any application of any sort to the appropriate election officials to become candidates. This is not a ballot access case. This is a voters' rights case.

Q. And just to clarify the bases for your lawsuits, plural, is there any limitation upon the obligation of the state to seat a person who obtains a plurality of votes at the general election stage or if this were a contested primary at the primary stage?

MS. JOHNSTON: I'm going to object on the basis of relevancy. I don't believe that our complaint in any way goes to the issue of the government seating a candi-

date that's been voted for in an election.

Q. Okay. Just to follow up on that, because I think it's real important, let's go back to our example of Mr. Pinkosh.

Assuming that Mr. Pinkosh lost in the primary, let's just assume that fact, and then let's assume that there's a write-in, if your proposal were adopted by the federal courts or the state courts or the state --

A. It's not a proposal. It's a statement of constitutional rights.

Q. You're entitled to your opinion for the time being. Let us assume that write-in voting were established under your theory of the United States Constitution.

Are you saying to us that if Mr. Pinkosh received a plurality of the votes at the general that would be the only way that he could obtain that if write-ins were implemented, is it your position that Mr. Pinkosh would have a right to be seated in the Office of State Senator and to oust Senator George?

MS. JOHNSTON: I'm going to repeat my objection to the question as it relates to our lawsuit. But if Mr. Burdick wants to answer what his philosophy about that is, which has no relevance one way or the other, he can answer.

A. I would say my understanding of the law in approximately forty-eight of the states of the United States, probably all of the territories, is that in this hypothetical Mr. Pinkosh would be declared the winner and he would be seated.

Only in Hawaii would I expect to see some objection from the Office of Lieutenant Governor. Hawaii is totally out of step with the rest of the United States.

Q. Would you say that in the state of Oklahoma, also, there would be no objection to the seating of Mr. Pinkosh under these circumstances?

A. I do not pretend to be familiar with Oklahoma's

election laws. I know you rely heavily on the fact that Oklahoma seems to -- seems to, I emphasize -- be with Hawaii in this very small minority of states that refuses to recognize the right of a voter to cast write-in votes.

I'm sure we can find other situations in which Hawaii is involved in unconstitutional activities and has one or two fellow states with it on such unconstitutional practices.

Q. As to the unopposed races in 1988, do you know for a fact whether there are unopposed races in both, that there are races where a Democrat is unopposed and that there are also races where a Republican may be unopposed?

MS. JOHNSTON: I'm going to object on the basis of relevancy.

A. Your question is unclear as to whether you're talking about unopposed within a primary but facing a general election opponent, or are you speaking of the nineteen people who are not opposed either in the primary or the general and have therefore been automatically elected because of lack of opposition, as the Honolulu Star-Bulletin characterizes it?

Q. Isn't it true frequently that in a party the incumbent will not be opposed at the primary stage?

MS. JOHNSTON: I'm going to object on the basis of relevancy. You can answer that.

A. My own experience as an observer of politics is that that statement is generally correct. Although, the word frequently of course is ambiguous.

Q. So that one would expect a fair number, if Hawaii is no different than any other jurisdiction, a fair number of situations in primaries, because of the natural course of politics people will not oppose an incumbent?

A. Again, I'm going to object to this entire line of questioning on the grounds of relevancy, and we can

have a good political science seminar here, Steve. That's just fine. Yes, I agree with your question.

Q. And you also would concede that there may well be situations in which an incumbent is so overwhelmingly popular that no one will oppose that person even from the other party; is that correct?

A. I object to the use of the verb concede, but otherwise I agree. Again, I object on the grounds of relevancy. I want to make it clear there's a standing objection to this whole line of questioning.

Q. I have no objection to making a running objection. It will probably save us some time.

Let me just ask the general question. At this stage of the election season, without telling me which person it is in any race in which you are entitled to vote at the primary stage, are there specific candidates who are not in the race now in one or the other parties -- well, let me make that question clear.

At this time are there people who are not presently signed up for the primary whom you would like to vote for on a write-in basis either at the primary or the general election in the races in which you're entitled to vote?

A. There are currently certain races in which I am entitled to vote where I wish to cast a write-in vote in all probability at the primary level and almost certainly in the general election, depending on the outcome of the primary.

Q. Is there any particular race where you can tell us you wish to cast a write-in vote today?

A. I object on the grounds of political privilege.

MS. JOHNSTON: Yes, I will join that objection.

MR. MICHAELS: And you're also instructing him not to answer? You're also instructing your client not to answer?

MS. JOHNSTON: Yes. I'm telling my client he does not have to answer that question because it invades his constitutional right to political privilege.

MR. MICHAELS: I appreciate what your position is on that. Although, I disagree with it under this circumstances.

THE WITNESS: Could you explain? Are you saying that I'm waiving certain privileges by bringing this lawsuit?

MR. MICHAELS: What I'm saying is that the court is entitled to know in which races we have a concrete controversy so that I can formulate a defense.

THE WITNESS: Okay. Mr. Michaels, we have a concrete controversy in every single race because none of us has a crystal ball and none of us knows what's going to happen by election day.

There may be a candidate in any given office whom I support enthusiastically in the primary and that candidate wins the primary, much to my delight, and a week later or a month later that candidate is prosecuted for election fraud, for any of a multiplicity of crimes that might be hypothesized -- the candidate becomes extremely ill, the candidate takes a position on an issue of great importance to me that I find to be an outrageous position, that I feel that the candidate has violated the trust that I had placed in him or her, or any of those reasons or none of them.

MS. JOHNSTON: Death. You forgot death.

THE WITNESS: And death. I am entitled to cast my vote in the general election for anyone whom I choose, including casting a vote against the person for whom I voted in the primary who actually won the primary.

BY MR. MICHAELS:

Q. So your position then is that the procedures for removing people from office once they have been seated, such as impeachment or forfeiture of office, if that is in fact a civil penalty that exists in Hawaii, are constitutionally insufficient to take care of the problem that you just identified, that is, things changing before election day?

A. Mr. Michaels, were you here in Hawaii in 1982?

Q. No, I was not. This is not your deposition of me, and if you could just stick to answering the questions. The question that I had was whether --

A. Let me give you a specific example.

Q. I'm just asking you the question. If you can answer it, answer it. If you want to make a speech, you can file it in your court documents.

The question I had is under your theory, the procedures for removing people from office once they're elected and seated is constitutionally insufficient to deal with the problem that you're talking about, that is, where people for one reason or the other, maybe they even changed their mind, don't like the person that is chosen at the primary or at the general election?

MS. JOHNSTON: Before you answer, I object on the basis of relevancy. Procedures for removal of people from office has absolutely nothing to do with the issue of voter being able to vote for whom he chooses.

If Mr. Burdick wishes to continue the political science debate with you, he may answer the question.

A. I most vigorously consider impeachment procedures to be an inadequate remedy for voters because, for example, and this is only one example, politicians cannot be impeached simply because they change their positions on political issues.

Thus, in the hypothetical that I have mentioned to you, if my reason for wishing to cast a write-in vote against someone for whom I had already voted in the primary were because that person had changed his or her position on an issue that was critical to me, that

would not be an impeachable offense, and I don't -- I also don't feel that the voters should have to tolerate a situation in which a person whom they do not want to see elected is seated in office and it takes the very long, drawn-out, cumbersome process of the impeachment machinery to remove that person in those limited situations where my reason for voting for a write-in candidate against that particular candidate would be an impeachable offense.

Q. And so just to extend that, is it true or is it not true that your theory in this case is that a process of recall by the voters which does not depend upon there being an impeachable defense is also what you described as an inadequate remedy?

MS. JOHNSON: Let me again object on the basis of relevancy. Just a second. Let me talk to him.

(Discussion off the record.)

THE WITNESS: The recall procedure, as I understand it, is available at the level of the City and County of Honolulu but does not apply to state offices, such as the State House of Representatives, the State Legislature, the State Board of Education, governor, lieutenant governor, United States senator, United States representative, president and vice president of the United States.

Therefore, the recall mechanism, which is also cumbersome, expensive, and fraught with delay and probably litigation, is an inadequate remedy for the voter who wishes to cast a write-in vote.

MR. MICHAELS: Okay. We've gone on for about an hour, if I could take five-minute break. There's only one other area that I think I want to get into that I want to make sure that I've exhausted. I'm pretty sure that I have.

(A recess was taken.)

THE WITNESS: For simplicity's sake, on a couple

of occasions before the break I referred to something to the effect that this is a voters' rights case rather than a ballot access case. I meant to speak of both cases, in the plural, in each instance.

BY MR. MICHAELS:

Q. Mr. Burdick, you yourself are an attorney of course, but you have naturally and properly been represented in this case by Ms. Johnston, correct?

A. As well as the American Civil Liberties Union, yes.

Q. And at all times their counsel has been in your judgment consistent with your interests and desires as a plaintiff?

A. I'm going to object to answering that question at the present time. If you show me how it may be relevant, I may answer.

Q. Sure. Why don't we get right to it. Did you ever have occasion to review the document entitled Stipulation Requesting the United States District Court for the District of Hawaii To Submit Certified Questions to the Supreme Court of the State of Hawaii?

A. Yes.

Q. You did review that document yourself?

A. Yes.

Q. I'd like to now show you an entire document which is styled on the front Notice of Motion, with accompanying papers, and it bears a file stamp date of August 1st, 1988, included within that is an Exhibit A to Declaration of Counsel.

Since I'm not the witness I will not testify as to what is stated, but I would simply like to direct your attention to the Exhibit A to that declaration, which purports to be a stipulation requesting the U.S. District Court, so on and so forth. And I would like to mark the whole exhibit as Defendants' Exhibit 1, if we could.

A. Okay. The entire document that was filed in Burdick versus Takushi bears a file stamp on the cover of August 1, 1988, and the stipulation to which Mr. Michaels has referred to me bears a separate file stamp of July 6th, 1988. At the bottom of the first page there's a handwritten, quote, A, end quote.

Now, what is your specific question with regard to this stipulation?

Q. I am asking you to testify whether prior to the filing of that document you read that document and whether you approved of your attorney signing that document on your behalf? And here I'm referring to the so-called Exhibit A, which is the stipulation filed on July 6.

A. It is a three-page document, not to be confused with what follows it, which has a stamp -- a rubber stamp exhibit, with a line, and then the letter A written above the line.

In answering your question, Mr. Michaels, I looked at this document at one point, perhaps on more than one occasion, before it was filed. I cannot tell you whether I looked at it in its final form and approved it in its final form.

Q. There is, is there not, an attachment to the document I will call the stipulation called an exhibit to that; is that correct?

A. The stipulation refers at the very last line of the text -- the last paragraph of the text of the stipulation on page 3 reads as follows, a proposed Order Certifying Questions of Hawaii Law to the Supreme Court of the State of Hawaii is attached hereto as Exhibit A, and then follows the document that I've just mentioned that has the rubber stamped exhibit -- the words -- the word exhibit rubber stamped at the bottom of the first page, and that document is captioned Order Certifying Questions of Hawaii to the Supreme Court -- strike that, Order Certifying Questions of Hawaii Law to the Supreme

Court of the State of Hawaii: Exhibit 1.

Q. And is it true that the identification of counsel on that exhibit refers to the three counsel who have represented you in this case?

A. We are now referring to the order --

Q. Yes.

A. -- which has the names of Kirk Cashmere, who is with the American Civil Liberties Union, Mary Blaine Johnston, and myself, pro se. Those names are indeed on this Exhibit A.

Q. And did you review or have the opportunity to review that Exhibit A prior to its filing in the district court?

A. As with the stipulation, I had an opportunity to look at this document, make comments and certain changes on it, but I cannot tell you right now because I do not remember whether I saw this document in its final form before it was filed and whether, if so, I approved it or not.

Q. Do you have any claim that your attorney was not authorized to file that stipulation on your behalf?

A. I did not say that.

Q. I understand that. So do you have any claim that your attorney was not authorized to file that stipulation?

A. I'm not claiming that she was not authorized to file this stipulation. No, I'm not.

Q. And you have no claim that she was not authorized to file that attachment?

A. What attachment?

Q. The proposed order.

A. That is correct.

Q. If that's your testimony --

A. I'm referring now to the three-page stipulation

and the two-page order.

Q. That's your testimony?

A. That's what I'm testifying to right now, yes.

MR. MICHAELS: That will be marked as Defendants' Exhibit 1.

THE WITNESS: Now, what is being marked?

MR. MICHAELS: The entire document, which includes within it the documents to which we have just been referring.

(Defendants' Deposition Exhibit No. 1 was marked for identification.)

MR. MICHAELS: I have no further questions. This is a deposition at which obviously you can ask cross if you want.

MR. JOHNSTON: I have a couple questions.

MR. MICHAELS: Sure. I would like to reserve the right to get into anything that you open, but otherwise I have nothing further.

EXAMINATION

BY MS. JOHNSTON:

Q. Mr. Burdick, you've testified that your case is premised on which you understand your constitutional right and the right of all voters to vote freely for candidates of their choice.

In the complaint of Burdick versus Takushi and again in Burdick versus Cayetano you set forth how the prohibition of write-in voting affects you.

Are you aware of any other effects of the prohibition of write-in voting to other voters in this state?

A. You mean how the public has been adversely affected in the past?

Q. Right, by the failure of Hawaii to provide for

write-in voters.

A. I think the failure is egregious. In every single election that has been unopposed where the government declares that these people are automatically elected because of lack of opposition, I feel that the people have clearly no right to either affirm their support for the unopposed candidate because the government doesn't even bother to count the votes or to state their opposition to the candidates who are unopposed by casting write-in votes. That is a problem that repeats itself from election to election.

In addition, there's been at least one instance in recent years, situations in which major matters have arisen after a primary that have effectively disenfranchised the voters who tend to cast their votes for one political party or another.

And I refer specifically to the 1982 incident involving one Ross Segawa, who was a candidate for the State House of Representatives in a district in urban Honolulu who was accused, and as I understand it later convicted, of voter fraud.

He was accused of getting friends of his to sign up as voters resident in his district when in fact they were not, using a false address of an old folks' home.

Mr. Segawa at the time, as I understand it, was a student at the University of Hawaii Law School and his friends were rather young people for living in an old folks' home and it was rather quickly found out.

What happened was the Democratic voters in that district had the choice of a voting for a person who was then accused of an election-related felony, to which he was later convicted, or for a Republican.

The district voted Republican for the first time in recent memory, and I believe it is quite clear that the people did not vote for the Republican because they liked the Republican because he was promptly voted out of office in the next available election.

The people of that district had no opportunity -- I'm

speaking of the Democratic voters of that district. They had no opportunity to vote for someone that they wanted to be their representative in the State House of Representatives. Rather, they had to choose between the lesser of two evils, a problem that Lieutenant Governor Cayetano in his inaugural address rather eloquently spoke to when he promised the people of this state two things during his term of office as lieutenant governor, one, to enact legislation to provide for write-in voting and, two, to provide for a presidential primary, neither of which has come to pass, on the grounds that people should no longer be forced to choose between the lesser of two evils. That was his reference to the write-in vote matter as opposed to the presidential primary.

Q. Are you aware of any other problems that the prohibition on write-in voting might create?

A. Sure. I think there's an example, and I hope by discussing this I'm not affecting reality in the sense that I have at least affectation for Mr. Mataunaga, but --

MR. MICHAELS: We have of course a running objection to the relevance of this, but I'll let it go forward.

THE WITNESS: You do? You have a running objection to the relevance of this?

MS JOHNSTON: To his answer or to the question?

MR. MICHAELS: To the questions, but I have no problem with it going forward.

MS. JOHNSTON: Wait. You're objecting to the question that I just posed on the basis that it's not relevant?

MR. MICHAELS: Uh-huh.

THE WITNESS: Is that a yes?

MR. MICHAELS: Yes, that is a yes. I apologize for that.

THE WITNESS: Could you explain the basis of your objection of relevance, because perhaps my counsel would rephrase her question if you would clarify your relevance objection.

MR. MICHAELS: The question as we see it under the constitutional test is whether there is an undue burden on political choice, as stated in the Munro case.

If the state provides adequate primary opportunities, these other problems that you are talking about, assuming even if you have standing to raise them, which I doubt, are problems that the criminal process and ultimately the political process as it is constituted, unless of course we are instructed by the state courts otherwise, will take care of sufficiently to meet applicable legal standards.

That's the nature of the objection, and part of that I think I could deal with on redirect, but I have no objection of course to the witness answering the question.

THE WITNESS: I just want to say something as to the question that my counsel asked me and as I answered it, that your objection does not meet that question because I gave a specific instance of a real-life case. I did not give a hypothetical answer.

It was a situation in which it is quite clear -- and you've been asking me questions in the nature of what is my view as a political observer. I think it is quite clear to any political observer that the people of the House of Representative District who wanted to vote for a Democratic candidate were in effect disenfranchised. They were forced to vote for the Republican to keep an alleged felon out of the State House of Representative, and if they had voted for that person it would have taken probably a year for him to be impeached and removed because it took that long for him to be convicted of the charge of voter fraud, and they would have had in office for a least a year a person under accusation of a felony.

The alternative was a person they did not want but they found to be evidently the lesser of two evils. I do not think that your thesis that somehow easy access to the primary would be sufficient, because as I recall the situation did not come -- it was not exposed even before the primary. And even if it were, the period for people to file in the primary was past, and therefore the easy access excuse that you constantly use for denying me my right to cast write-in votes is totally irrelevant.

I think my counsel wanted to rephrase the question, without withdrawing the original question, without withdrawing the original answer.

MS. JOHNSTON: I'll rephrase it.

BY MS. JOHNSTON:

Q. Mr. Burdick, are you aware of ways in which the prohibition on write-in voting could unduly burden the political process, since that's what Mr. Michaels is interested in?

A. I think it unduly burdens the political process at any time that a voter is not free to cast his or her vote for whomever he wishes, whether or not that person is listed on the ballot.

Q. Well, in terms of problems that would unduly burden the political process arising from this ban on write-in voting.

MR. MICHAELS: You're asking for the opinion of the witness?

MS. JOHNSTON: Yes.

MR. MICHAELS: On the understanding that it's his opinion only, I have no objection to the question.

THE WITNESS: I think in the immediate future there's a potential problem, and I earlier said I was going to mention something about Senator Matsunaga, and I'm using his situation only as an example and I hope

that the hypothetical I mentioned does not come to pass.

There have been reports in the newspapers that Senator Matsunaga is not in very good health. He's over seventy years old.

It is conceivable that he could die or become ill before the primary. It is also conceivable that he could win the primary. He has opposition that is not expected to win.

Sometime after the primary he might become very ill and he could, for example, withdraw. The election code, if this statute is current, I believe it is Section 11-118, provides in the case of the death, withdrawal, of disqualification of any party candidate after filing -- presumably this applies after primaries as well -- the vacancy so caused may be filled by the appropriate committee of the party.

Now, let's say in this situation, and I'm sure it's correct, that there are a number of people who would gladly have made themselves candidates for the position in the United States Senate had Senator Matsunaga not chosen to run for reelection.

Let us assume that I enthusiastically -- let's say hypothetically that I am a Democrat and that I hypothetically am enthusiastically in favor of Senator Matsunaga but that in Senator Matsunaga's absence I would be enthusiastically in favor of candidate A.

Well, let us assume that the primary takes place, Senator Matsunaga wins the primary overwhelming, but shortly afterwards becomes ill and withdraws.

The appropriate committee of the Democrat party chooses Mr. B to be the party's candidate in the November election. I do not like Mr. B in my hypothetical and I am forced to choose between Mr. B., whom I do not like, or the Republican candidate, whom I do not like, or the Libertarian candidate, whom I do not like, that in a case like this I want to vote for candidate A and I am forbidden to do so by the current state of the election laws in this state, notwithstanding my constitutional right

to cast write-in votes.

I think that that is a very real danger. It is not within the realm of impossibility by any means. People would not be terribly surprised if this came to pass in this election this year.

Again, I hope it doesn't happen and I do not wish to express any opinion as to my desire to vote for or against Senator Matsunaga, but it is a very real possibility.

And that affects the United States Senate. It's very interesting because approximately ??? not sure of the exact figure. I'm sure ????? able to get it -- somewhat less than one percent of the people who are registered voters in this state may cast absentee ballots overseas. Under a federal law they are entitled to cast write-in votes for candidates for federal office.

However, the ninety-nine percent plus of us registered voters in Hawaii who will not happen to be overseas on election day will not be allowed to do so, creating a rather absurd situation, in my view.

MS. JOHNSTON: Okay. Mr. Burdick, do you have any ideas as to how the prohibition on write-in voting not only creates undue burden on the political system but it could in fact subvert the political system?

MR. MICHAELS: Again, you're calling for the person's opinion?

MS. JOHNSTON: Correct.

MR. MICHAELS: This is a matter of course that will ultimately be decided by the court.

THE WITNESS: What will be decided by the court?

MR. MICHAELS: Whether there is an undue burden.

THE WITNESS: Yes. In 1986 I remember particularly -- I'm not sure whether it's happened this year -- there were at last two instances in which Democratic

candidates won a Democratic candidate for the State Senate by trying to disqualify his Republican opponent, after the filing deadline of course, on the grounds that one or two of the signatures on his petition were invalid and therefore there was an insufficient number of signatures on his petition and therefore he would be disqualified as a candidate and therefore the particular Democratic candidate would have no opposition in the general election, and since the particular Democratic candidate did not have any opposition in the primary, he was automatically elected because of lack of opposition. That occurred in at least two instances, as I say, in 1986.

As I understand it, and I'm not entirely sure because of the vagueness of the election laws here, I believe in a situation like that where the sole candidate of the party is disqualified, I'm not sure whether the party is able to pick a replacement candidate since the sole candidate had been disqualified for failure to meet the petition requirements.

In any event, even if the party committee, in this case the Republican party, had been able to put in stand-in candidates in those two elections, one in the State Senate and one in the State House of Representatives, it's clear that the candidate who was presumably the consensus candidate of the Republican party would be unable to be the candidate and that a perhaps reluctant candidate would have to be chosen, frustrating very much the desires of the Republican party in the instance, and I'm sure there are similar instances where this has worked against the Democratic candidate and against the Democratic party.

And I think that it is clear that situations like that tend to subvert the two-party system as well as of course frustrating the rights and desires of the electorate in those districts.

MS. JOHNSTON: I don't have any further questions.

EXAMINATION

BY MR. MICHAELS:

Q. Just to follow up on what was discussed on cross, do you recall the district in which Mr. Segawa was running, if he was the candidate that you were referring to in 1982?

A. It was one of the urban districts of Honolulu. I'm not sure whether it was the downtown district or Makiki or -- I believe it was the Makiki district, No. 28, but I'm not sure.

Q. Mr. Burdick, can you state for the record your address, your home address today and what it was in 1982?

A. Same, 144 Kapaa Street, Kailua. I was not in the district. I'm not making any claim that I was in that district. I certainly didn't register to vote in that district.

My point is that what happened to the people of that district could very well happen to me in my district, either in the State House of Representatives, the United States Senate, the United States House of Representatives, the governorship, or any other elected office. That's why I am seeking injunctive relief, so that I am protected in the future.

Q. Mr. Burdick, you're aware that there are provisions of law whereby a vacancy in office is filled following election; is that correct?

A. Following an election?

Q. Following an election. Let's take an example that I am familiar with in my home state of New York, where I was from originally.

When Senator Kennedy was assassinated there was an internal appointee made by then governor Rockefeller. Hawaii has statutes that would deal with that kind of a situation if, heaven forbid, anything similar would happen to any of our members of Congress. So--

A. I believe it applies to the United States Senate

but not to the United States House of Representatives.

Let's also recognize that a substantial number of members of the State Senate and State House of Representatives were appointed by Governor Waihee pursuant to provisions I believe in the State Constitution that allow him to fill vacancies in the State Legislature.

Q. And do you contend in this case that those provisions are unconstitutional notwithstanding the fact that you as a voter don't have the right to have any participation in the governor's decisions to make replacements?

MS. JOHNSTON: I just want to be sure I understand the question. You're asking whether either of the lawsuits in which he is being deposed today challenge the right of the governor to appoint a replacement candidate?

MR. MICHAELS: Challenge the governor in a situation where there is a resignation following election.

MS. JOHNSTON: You're asking is that part of this lawsuit?

BY MR. MICHAELS:

Q. Is it part of the lawsuit and would any of the theories that you're using in this lawsuit extend to the situation so that it would be unconstitutional for the governor without allowing anyone other than himself or herself, when this state elects a woman governor, to make the sole decision to appoint those replacements?

A. It is not within the scope of my current lawsuit. It is quite possible that judicial determinations that result from my lawsuit may have some effect on the issues that you've mentioned, but that is a matter of speculation, it's a matter of interpretation of law, and I don't see how it's relevant to my lawsuit. My lawsuit has to do with voters' rights when elections occur and not necessarily as to how frequently elections should take place or when special elections should take place.

Q. So you concede, therefore, at least for purposes of this lawsuit, that the state has the discretion to set the elections when it wants and to set special elections when it wants?

A. No, I don't.

Q. You don't. Okay. Do you know of any provision of state law that prohibits a person from filing more signatures than are minimally required in order to assure that the likelihood of being disqualified after you file your signatures is diminished?

MS. JOHNSTON: I'm going to object on the basis of relevancy. I'll also object that this is going beyond the three questions that I asked in the cross-examination.

MR. MICHAELS: If he can answer.

THE WITNESS: I'm not aware of what the statute says. I'm sure the statute will speak for itself.

MR. MICHAELS: That's all I have.

(Deposition concluded at 3:30 p.m.)

[Certification Omitted in Printing]
[Certificate of Service Omitted in Printing]

[Portions of Plaintiff's Brief to the Hawaii Supreme Court (December 2, 1988), excerpted from "Exhibit S" to the Declaration of Steven S. Michaels (April 19, 1990) in Support of Defendants' Counter-Motion for Summary Judgment]

* * *

[Page 13]

The decisions in the cases discussed above hold that a ban on write-in voting is a denial of the right to vote freely in violation of the states' constitutions. Recent state court and federal court cases have viewed the denial of the right to write in as a violation also of the Federal Constitution's First and Fourteenth Amendment rights. (For a detailed discussion, see Robert Batey, "Electoral Graffiti: The Right to Write In," 5 Nova Law Journal 201 (1981).)

In *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983 (S.D. Ohio 1968), a three-judge panel took the position that to the extent the Ohio election laws deprived voters of their right to suffrage "either by denial of ballot position or effective write-in, they are unconstitutional and void." (290 F. Supp. at 990) The court rejected the arguments raised by the state that write-in candidates did not have a chance of winning and that write-in ballots presented administrative problems by stating:

A blanket prohibition against the use of write-in ballots denies the qualified electors of Ohio the right to freely participate in the electoral process as guaranteed by the Constitution and violates the "equal protection" clause of the Fourteenth Amendment.

Id at 987

A First Amendment as well as a Fourteenth Amendment analysis was used by the California Supreme Court in *Abdelnour*, 40 Cal. 3d 703, 701 P.2d 268, 221 Cal.

Rptr. 468 (1985), in holding that San Diego's ban on write-in voting affects both the right of a candidate to seek public office as well as the right of voters to cast votes for candidates of their choice. The court held that both rights "are of sufficient magnitude to warrant the protection of the First and Fourteenth Amendments and the comparable provisions of our State Constitution" (221 Cal. Rptr. at 475) In weighing the nature of the right to be protected by permitting the widest possible voting choice for electors, the court observed that a voter's priorities and interests might not be represented by anyone listed on the ballot and that regardless of whether candidates not listed on the ballot have a chance to win, "it is important in a free society that political diversity be given expression." *Id* at 476. The *Canaan* court, applying the "balancing test" set forth by the U.S. Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 708 (1983), weighed injuries to the would-be candidate and voter who cannot write in against the city's alleged interests and "Justifications" for prohibiting the write-in and rejected every one of the city's arguments.

The *Canaan* court went even further in its analysis and rejected the city's contention that a voter is "not forced to vote for someone listed on the ballot" as a reason for refusing to calculate write-in votes. The court found that merely writing in a name without the counting of that name is constitutionally insufficient. Citing a Georgia case, *Thompson v. Wilson*, 223 Ga. 370, 155 S.E.

⁴ Some of the excuses advanced by the city and rejected by the court for not permitting write-in ballots were: 1) candidates must meet charter qualifications; 2) candidates must display willingness to serve; 3) the public should have adequate time to evaluate candidates' abilities; 4) candidates elected ought to receive a majority of the vote; 5) the scheme for electing the council will be interfered with. Many of these are the same arguments Defendants in *Burdick* raised in the Federal case, and which the District Court, applying *Anderson v. Celebrezze*, rejected.

2d 401 (1967), the court held:

A right to "express Cone's] feelings" without legal effect, however, is antithetical to the fundamental nature of the right to vote. The First Amendment guarantees the right to *public* political expression. If the expression is so effectively muffled that no one can hear it, this guarantee is a hollow one. As this court has said in a slightly different context, "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or (the) right to pull a lever in a voting booth. . . . It also includes the right to have the vote counted at full value without dilution or discount." (citations omitted).

Canaan, *supra* 221 Cal. Rptr. at 477

It should be noted that there is not a single reported decision in which a state or federal court has squarely held that an across-the-board ban on write-in voting in all elections, as in Hawaii, is constitutionally acceptable. The reported cases on point alternately hold state laws prohibiting write-in voting violate the state constitution, or interpret laws that are silent on the issue as requiring construction that write-in voting is permitted to avoid constitutional problems. Additionally, many courts have held by way of dicta that voters have a constitutional right to write-in. (*Canaan v. Abdeulnour*, *supra*, 221 Cal. Rptr. at 482 fn. 22, lists 27 cases that speak to this issue, all of which support the right of voters to cast write-in votes.) Defendants herein can cite to no cases which support a position that a prohibition on write-in voting is constitutionally acceptable.

Defendants, in the Federal proceedings, have inappropriately relied on the Hawaii case *Jensen v. Turner*, 40 Haw. 604 (1954). In *Jensen*, the Court invalidated legis-

lation passed by the 1949 legislative session which attempted to amend the Territorial election laws to permit write-in voting. The *Jensen* decision has no precedential authority for the question currently before this court as 1) the election laws the legislature sought to amend in 1949 have been supplanted by the current statute; and 2) the Supreme Court's voiding of the legislation was based on the fact that its form violated Section 45 of the Organic Act in that the title of the bill passed failed to include that it dealt with write-in voting. Indeed, the *Jensen* court specifically recognized that the issue of whether the United States constitution was violated by the ban on write-in ballots was *not* before the Court.

2. In construing Hawaii's Constitution, the Court Should Take Note of the Construction of Parallel Portions of the Federal Constitution.

The Constitutions of Hawaii and of the United States broadly provide for the right to vote, with the specifics as to the conduct of the elections to be spelled out by the legislature. The right to vote freely for a candidate of one's choice arises implicitly from the rights to freedom of speech and equal protection in parallel sections of the Hawaii and Federal Constitutions. Article I, Section 4 of the Hawaii Constitution tracks almost exactly the language of the First Amendment of the United States Constitution, and Article I, Section 5 tracks almost exactly the language of the Fourteenth Amendment to the United States Constitution. Additionally, the Hawaii constitution specifically adopts the United States Constitution "on behalf of the people of Hawaii."

Thus, this Court can look at interpretations of parallel portions of the U.S. Constitution to guide it in its interpretation of the Hawaii Constitution:

[It is Hawaii Supreme Court's] obligation to interpret and enforce the state constitution

as the highest court of this sovereign state and not in total disregard of federal interpretation of identical language but with reference to the wisdom of adopting these interpretations for our state.

Huihui v. Shimoda, 64 Haw. 527, 531, 644 P. 2d 964 (1982)

During the Federal Court proceedings, Defendants conceded that the right Plaintiff asserted was a First Amendment right. Although the U.S. Supreme Court has never directly ruled on the issue of whether a ban on write-in voting is constitutional, the decisions by it in *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L.Ed. 2d 554 (1970), and *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), by implication adopt the principle that write-in voting is fundamental to the right of a voter to vote for a candidate of his or her choice.

In *Jenness, supra*, the Georgia statute under challenge was that which required that a candidate who did not enter and win a political party's primary could have his name printed on the ballot in the general election only if he filed a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question.

While *Jenness* is a ballot access case rather than a voters' rights case, it affirms the importance of the availability of write-in voting as contributing to a constitutionally sound statutory election scheme. The Supreme Court held that the burdens imposed on a candidate to have her name printed on the ballot did not render the election statute unconstitutional where, among other things, the election law did not prohibit write-in votes.

It is to be noted that these procedures relate only to the right to have the name of a candidate or a nominee of a "political body" printed on the ballot. There is no limitation

whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted. (emphasis added)

Jenness, supra, 29 L.Ed.2d at 588

That write-in voting is critical to the constitutional right of the voter to cast a vote for the candidate of his choice, is inherent in the Supreme Court's decision in *Williams v. Rhodes, supra*. There the Supreme Court invalidated the Ohio election scheme because the state's complicated regulations made impractical any alternative to the two major political parties. The court found that to comply with the First and Fourteenth Amendments, the state had to provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. Again, while this case is primarily a ballot access case rather than a voters' rights case, the court observed that

The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Williams v. Rhodes, supra 393 U.S. at 23

In analyzing the power of the state to impose restrictions on the right to vote, the *Williams* court points out that the Constitution prohibits restrictions on the basis of race or sex (Fifteenth and Nineteenth Amendments) and on the basis of a poll tax (Twenty-fourth Amendment):

We therefore hold that no state can pass a law regulating elections that violate the Fourteenth Amendment's command that "no state shall . . . deny to any person . . . the equal protection of the laws."

Id. 393 U.S. at 29

The relief given by the three-judge District Court to

the two minority political parties to "cure" the Ohio election statutes was to require that the election officials permit write-in voting which was banned by Ohio law. The ability to write in a candidate was seen by the Supreme Court as, at least, a partial remedy for the voters' inability to vote for a candidate from other than the two major parties.

One further case that indirectly supports the proposition that write-in voting is integral to freedom of choice by the voter is *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L.Ed.2d 714 (1974). In that case, the Supreme Court upheld that part of a three-judge District Court decision which had held constitutional a California law which precluded from being printed on the ballot the name of an independent candidate who had voted in a party primary or had a registered affiliation with a political party prior to the primary election. The Supreme Court, in holding the statute was not unconstitutional, states:

Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law.

Stoner, supra, 415 U.S. at 736, fn. 7

Plaintiff believes it is clear that, without directly addressing the precise question before this Court, the Supreme Court has spoken on the importance of the casting and counting of write-in votes. This Court in not being asked to consider whether Hawaii's law is constitutional under the Federal Constitution, as this question has been expressly reserved by stipulation for decision by the Federal Court, if necessary subsequent to this Court's answers to Certified Questions. (R. 27, at 3) Rather, Plaintiff asks the Court to take note of the construction of those parts of the Federal Constitution, specifically the First and Fourteenth Amendments which are virtually identical to sections of the Hawaii Constitution,

in providing its answers to the Certified Questions.

* * *

[Page 30]

VII. CONCLUSION

Plaintiff urges this Court to answer the three questions certified to it by the United States District Court in the way that will extend to Hawaii's residents the widest possible freedoms in voting for candidates of their choice, using write-in voting as a means of exercising this freedom. Defendants' position that write-in voting is not permitted by the Hawaii Constitution or Hawaii's election laws has no authority behind it as there is not a single legal authority Defendants can use to back up their position that a blanket ban on write-in voting in elections is constitutionally acceptable.

To date, Defendants have clouded the voters' rights issue by trying to contort ballot access cases into having some relevance. Plaintiff Burdick has not questioned a single statute, rule, or constitutional provision which regulates what candidates must do in order to have their names *printed* on a ballot. Plaintiff herein has challenged only the thus far successful efforts by the State to prevent voters in Hawaii from enjoying the same right to full choice of candidates that are offered to the voters in at least 47 other states.

Plaintiff respectfully asks the Court to guarantee that Hawaii voters will be able to exercise true freedom of choice in selecting who governs them.

DATED: Honolulu, Hawaii, December 2, 1988

s/s
MARY BLAINE JOHNSTON
Attorney for Plaintiff-Appellant

UNITED STATES DISTRICT COURT

DISTRICT OF Hawaii

ALAN B. BURDICK,

vs.

MORRIS TAKUSHI, et al.

ALAN B. BURDICK,

vs.

BENJAMIN CAYETANO, etc., et al.

Case Number: 86-0582 HMF
86-00365 HMF

— Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to xxxxx hearing before the Court. The issues have been xxxxx heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Summary Judgment is entered in favor of Plaintiff and against Defendants. IT IS FURTHER ORDERED that the Motion for Permanent Injunctive Relief is GRANTED.

cc: all counsel

Date MAY 15 1990 /s/ Clerk

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[List of Counsel Omitted in Printing]
[Captions Omitted In Printing]

NOTICE OF APPEAL

Notice is hereby given that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (defendants above named in Civil No. 86-0582, consolidated with Civil No. 88-0365), and the Lieutenant Governor's successor, Benjamin Cayetano, Lieutenant Governor, State of Hawaii, hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay," entered in Nos. 86-0542 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Notice is also hereby given that Benjamin Cateyano, in his individual capacity, in his individual capacity as Lieutenant Governor of the State of Hawaii, and in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, Director of Elections of the State of Hawaii (defendants in Civil No. 88-0365, consolidated with Civil No. 86-0582), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion

for Stay," entered in Nos. 86-0582 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Dated: Honolulu, Hawaii, June 6, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Room 214, 425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Attorneys for Defendants
in Civil Nos. 86-0587 and
88-0365-HMF (D. Haw.)

[Certificate of Service Omitted in Printing]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]
[Captions Omitted In Printing]

NOTICE OF APPEAL

Notice is hereby given that Morris Takushi, Director of Elections, State of Hawaii, and John Waihee, Lieutenant Governor, State of Hawaii (defendants above named in Civil No. 86-0582, consolidated with Civil No. 88-0365); and the Lieutenant Governor's successor, Benjamin Cateyano, Lieutenant Governor, State of Hawaii, hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay," entered in Nos. 86-0582 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Dated: Honolulu, Hawaii, June 12, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS

Deputy Attorneys General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Attorneys for Defendants
in Civil Nos. 86-0582 and
88-0365-HMF (D. Haw.)

[Certificate of Service Omitted in Printing]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

[List of Counsel Omitted in Printing]
[Captions Omitted In Printing]

NOTICE OF APPEAL

Notice is hereby given that Benjamin Cateyano, in his individual capacity, in his individual capacity as Lieutenant Governor of the State of Hawaii, and in his capacity as Lieutenant Governor of the State of Hawaii, and Morris Takushi, Director of Elections of the State of Hawaii (defendants in Civil No. 88-0365, consolidated with Civil No. 86-0582), hereby appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the "Order Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief; Denying Defendants' Counter-Motion for Summary Judgment; and Granting Defendants' Conditional Counter-Motion for Stay" entered in Nos. 86-0582 and 88-0365 on the 10th day of May, 1990, from the "Judgment in a Civil Case" entered in Nos. 86-0582 and 88-0365 on the 15th day of May, 1990, and from any and all subsidiary, prior, or included findings, conclusions, orders, decisions, or judgments contained therein, or leading up thereto.

Dated: Honolulu, Hawaii, June 12, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

s/s
CHARLENE M. AINA
STEVEN S. MICHAELS

Deputy Attorneys General
State of Hawaii

Room 214, 425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Attorneys for Defendants
in Civil Nos. 86-0582 and
88-0365-HMF (D. Haw.)

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	)	Nos. 90-15873
	)	90-15876
<i>Plaintiff-Appellee,</i>	)	90-15877
)	
vs.	)	DC# CV-86-582
	)	-HMF
MORRIS TAKUSHI, Director	)	Hawaii
of Elections, State of Hawaii;)	
JOHN WAIHEE, Lieutenant)	
Governor of Hawaii;)	
BENJAMIN CAYETANO in)	
his capacity as Lieutenant)	
Governor of the State of)	
Hawaii; MORRIS TAKUSHI,)	
Director of Elections of)	
the State of Hawaii,)	
)	
<i>Defendants-Appellants.</i>)	

ORDER

Appellants' motion to consolidate appeal Nos. 90-15873, 90-15876, and 90-15877 is granted.

Appellants' motion to expedite these consolidated appeals is granted. The briefing schedule is as follows: appellants' opening brief and excerpts of record are due August 8, 1990, appellee's brief is due September 7, 1990, and the optional reply brief is due September 21, 1990.

These cases shall be accorded priority in hearing date pursuant to Ninth Cir. R. 34-3(3) and shall be

placed on the November 1990 Hawaii calendar.

Appellants have advised that the reporter's transcripts have been prepared and filed. If the certificate of record has not been issued, the district court shall do so at its earliest convenience.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

s/s
Adrienne H. Hickman
Deputy Clerk

JUDGMENT

=====

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 90-15873
CT/AG#: CV-86-0582-HMF
CT/AG#: CV-88-0365-HMF

ALAN B. BURDICK

Plaintiff-Appellee

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, Ltd., in his capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of the State of Hawaii

Defendants-Appellants

NO. 90-15876
CT/AG#: CV-86-0582-HMF

ALAN B. BURDICK

Plaintiff-Appellee

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii

Defendant-Appellant

NO. 90-15877
CT/AG#: CV-88-0365-HMF

ALAN B. BURDICK

Plaintiff-Appellee

v.

BENJAMIN CAYETANO, Ltd., in his capacity as
Lieutenant Governor of the State of Hawaii; MORRIS
TAKUSHI, Director of Elections of the State of Hawaii

Defendant-Appellant

APPEAL FROM the United States District Court
for the U.S. District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Tran-
script of the Record from the United States District
Court for the U.S. District Court for the District of Ha-
waii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court, that the judgment
of the said District Court in this cause be, and hereby is
REVERSED.

Filed and entered 28 June 1991.

JAN 23 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Gov-
ernor of Hawaii; BENJAMIN
CAYETANO, in his capacity
as Lieutenant Governor of
the State of Hawaii,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX
VOLUME II OF II (pages 215-284)

Warren Price, III
Attorney General
State of Hawaii

Steven S. Michaels
(*Counsel of Record*)
Deputy Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

Counsel for Respondents

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Counsel for Petitioner

TABLE OF CONTENTS*

Page

VOLUME I

Relevant Docket Entries	1
United States District Court	1
Supreme Court of Hawaii	11
United States Court of Appeals	12
Complaint for Declaratory and Injunctive Relief (No. 86-582), dated Aug. 21, 1986	31
Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief (No. 86-582), dated Sept. 10, 1986	37
<i>including</i> Affidavit of Alan B. Burdick, dated Sept. 9, 1986	28
and [Proposed] Order Granting Motion for Summary Judgment, and for Preliminary and Permanent Injunctive Relief, undated	50
Answer (No. 86-582), dated Sept. 15, 1986	53
Affidavit of Dwayne D. Yoshina, dated Sept. 19, 1986	56
Opinion and Order of the District Court (No. 86-582), dated Sept. 29, 1986	*

* Entries marked with an asterisk (*) are included in the appendix to the petition for *certiorari*.

	<i>Page</i>
Judgment of the District Court (No. 86-582), dated Sept. 30, 1986	59
Notice of Appeal (No. 86-582), dated Sept. 30, 1986	60
Motion for Stay, Suspension or Modification of Injunction, dated Oct. 3, 1986	61
<i>including</i> Affidavit of Dwayne D. Yoshina, dated Oct. 3, 1986	62
Order Denying Motion for Stay, Suspension, or Modification of Injunction, dated Oct. 8, 1986	76
Notice of Appeal (No. 86-582), dated Oct. 8, 1986	108
Order of the Court of Appeals granting emergency stay, dated Oct. 15, 1986	109
Opinion of the Court of Appeals, dated May 17, 1988	•
Judgment of the Court of Appeals, dated May 17, 1988	110
Complaint for Declaratory and Injunctive Relief (No. 88-365), dated May 17, 1988	111
Answer (No. 88-365), dated June 7, 1988	124
Order Certifying Questions of Hawaii Law to the Supreme Court of the State of Hawaii, dated July 19, 1988	131
and	

	<i>Page</i>
Certified Questions from the United States District Court for the District of Hawaii to the Supreme Court of the State of Hawaii	133
Amended Certification from the District Court to the Hawaii Supreme Court, dated Aug. 9, 1988	•
Order Denying Motion for Amendment of Certification Order, dated Aug. 25, 1988	136
District Court Order Consolidating Cases, dated Nov. 21, 1988	142
Opinion of the Hawaii Supreme Court, July 21, 1989	•
Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief, dated Feb. 8, 1990	143
<i>including</i> Affidavit of Alan B. Burdick, dated Feb. 5, 1990	144
and [Proposed Order] Granting Plaintiff's Motion for Summary Judgment and Permanent Injunctive Relief, undated	147
Defendant's Counter-Motion for Summary Judgment and Conditional Counter-Motion for Stay, dated April 19, 1990	150
<i>including</i> Declaration of Dwayne Yoshina, dated April 19, 1990	152
and Deposition of Alan B. Burdick, dated Aug. 26, 1988	155

Page

and Portions of Plaintiff's Brief to the Hawaii Supreme Court, dated Dec. 2, 1988 (as exhibits)	196
Opinion and Order of the District Court, dated May 10, 1990	*
Judgment of the District Court, dated May 15, 1990	204
Notice of Appeal, dated June 6, 1990	205
Notice of Appeal, dated June 12, 1990	207
Notice of Appeal, dated June 12, 1990	209
Order of the Court of Appeals Consolidating Appeals, dated July 23, 1990	211
Opinion of the Court of Appeals, dated March 1, 1991 (subsequently withdrawn)	*
Order and Opinion of the Court of Appeals, dated June 28, 1991	*
Mandate, dated June 28, 1991	213

VOLUME II

Hawaii General Election Results	215
---	-----

Result of Votes Cast

General Election

Tuesday, November 2, 1976

State of Hawaii

Prepared by

Office of the Lieutenant Governor
Lieutenant Governor Nelson K. Doi

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1976

President-Vice Pres.	(1)	100.0	State Rep. Dist. 1	(1)	100.0
(D) Carter/Mondale	147,375	47.6	(D) Suwa, Jack		63.5
(R) Ford/Dole	140,003	45.2	(R) Pulham, Floyd W.		29.9
(L) MacBride/Bergland	3,923	1.2	State Rep. Dist. 2	(2)	100.0
U.S. Senate			(D) Yamada, Kats		63.1
(D) Matsunaga, Sparky M.	162,305	52.5	(D) Segawa, Herbert A.		61.1
(R) Quinn, William F.	122,724	39.7	(R) Akana, Bernard K.		26.1
(P) Hodges, Tony	14,226	4.6	(R) Wong, John A. O.		10.4
(N) Kimmel, James D.	1,433	.4	State Rep. Dist. 3	(1)	100.0
(L) Johnson, Rockne	1,404	.4	(D) Takamine, Yoshito		69.0
Rep. to Congress CD 1			State Rep. Dist. 4	(1)	100.0
(D) Heftel, Cecil	60,050	42.4	(D) Inaba, Minoru		49.4
(R) Rohlfing, Fred	53,745	38.0	(R) Isbell, Virginia		45.7
(I) Hoshijo, Kathy	23,807	16.8	State Rep. Dist. 5	(2)	100.0
Rep. to Congress CD 2			(D) Machida, Gerald K.		51.0
(D) Akaka, Daniel K.	124,116	73.9	(D) Caldito Jr., Richard		45.5
(R) Inouye, Hank	23,917	14.2	(R) McCord, Warren I.		26.8
(I) Penaroza, Billy K.	3,461	2.0	(I) Durkan, Michael J.		23.2
(P) Cate, Dexter	2,408	1.4	State Rep. Dist. 6	(2)	100.0
(L) Smith, Don	2,197	1.3	(D) Ueoka, Meyer M.		57.2
State Senate Dist. 7			(D) Kondo, Ronald Y.		53.2
(R) Soares, Buddy W.	24,348	49.6	(R) Santos, Velma M.		42.4
(D) Nakama, Keo	21,289	43.5	(I) Midgett, Johnny B.		5.8

State Rep. Dist. 7	(2)	100.0	(D) Whitetto, Lfeto	1,530	13.9
(R) Ikeda, Donna R.		57.5	(I) Olsen, Larry	840	7.6
(D) Dods, Robert D.		48.6	State Rep. Dist. 12	(2)	100.0
(R) Hemmings Jr., Fred		40.0	(D) Owaine, Clifford T.	6,704	65.7
(D) Kay, Emmet		27.5	(D) Takamura, Carl T.	5,630	55.2
State Rep. Dist. 8	(2)	100.0	(R) Oshima, Dick	3,673	36.0
(D) Cobb, Steve		74.2	(R) Simutis, Frank	1,115	10.9
(R) Larsen, Jack		46.0	State Rep. Dist. 13	(3)	100.0
(D) Charles, Mary		27.9	(D) Abercrombie, Neil	11,353	66.8
(R) Cleveland, Richard		20.9	(D) Oshijima, Charles T.	8,248	48.5
(I) Martin, Steven C.		1.5	(R) Fong Jr., Hiram Leong	7,397	43.5
State Rep. Dist. 9	(2)	100.0	(D) De Beer, Gerald	7,066	41.6
(D) Say, Calvin K. Y.		64.3	(R) Briggs, Mark	3,866	22.7
(D) Morioka, Ted		47.9	(R) Lee, Licius Kealoha	1,498	8.8
(R) Hakoda, Dan S.		37.6	(I) Dentine, Barbara	1,174	6.9
(R) Goodness, Guy N.		14.3	State Rep. Dist. 14	(2)	100.0
State Rep. Dist. 10	(2)	100.0	(D) Stanley, Kathleen	5,458	51.7
(D) Kiyabu, Ken		56.0	(D) Blair, Russell	5,354	50.7
(D) Kaito, Lisa		48.7	(R) Yee, Michael	3,449	32.6
(R) Yee, Gerald W. N.		33.4	(R) Gray, Lee	3,239	30.7
(R) Kalapa, Lowell L.		31.2	State Rep. Dist. 15	(2)	100.0
State Rep. Dist. 11	(2)	100.0	(D) Baker, Byron	6,847	57.4
(R) Kamalii, Kinau Boyd		54.6	(R) Sutton, Richard Ike	5,675	47.6
(R) Carroll, John S.		49.2	(D) Kimura, Robert	5,401	45.3
(D) Shon, Jim		32.8	(R) Solidon, James	2,542	21.3

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1976

State Rep. Dist. 16	(2)	100.0			
(R) Narvaes, Tony		5,709		(R) Guard Jr., Charlie A.	4,518
(D) Mina, Ted		5,664	51.7	(R) Kama, Carmel Lee	1,217
(D) Sikima, Akira		4,596	51.3	State Rep. Dist. 22	(2)
State Rep. Dist. 17	(2)	100.0	41.6	(D) Nakamura, Yoshiro	6,108
(D) Campbell, Charles M.		8,224	69.7	(D) Lunasco, Ollie	4,611
(D) Garcia, Richard		6,140	52.0	(R) Logan, Cheryl Kuoha	4,563
(R) Johnson, William		2,730	23.1	(R) Stagner, Ishmael W.	1,588
State Rep. Dist. 18	(2)	100.0		(I) Gleason, Robert G.	410
(D) Uechi, Mitsuo		7,109	59.1	State Rep. Dist. 23	(1)
(D) Wakatsuki, James H.		6,168	51.2	(D) Toguchi, Charles T.	4,201
(R) Ridley, Walter K.		2,877	23.9	(R) Clarke, George W.	2,591
(P) Neilson, Mary R.		2,593	21.5	(I) Figueroa, Debbie	399
State Rep. Dist. 19	(2)	100.0		State Rep. Dist. 24	(2)
(D) Cayetano, Benjamin J.		11,557	77.9	(R) Evans, Faith P.	6,842
(D) Mizuguchi, Norman		9,847	66.3	(R) Ajifu, Ralph Kanichi	6,311
State Rep. Dist. 20	(2)	100.0		(D) Wasai, Richard H.	4,585
(D) Shito, Mitsuo		7,355	55.0	(D) Humphries, Valerie	3,861
(D) Kihano, Daniel		7,258	54.2	State Rep. Dist. 25	(2)
(R) Kamakahi, Pii		5,259	39.3	(R) Medeiros, John J.	7,132
State Rep. Dist. 21	(2)	100.0		(R) Poepoe, Andrew K.	6,853
(D) Aki, James		8,175	64.2	(D) Aweau, Norman E. P.	4,475
(D) Peters, Henry H.		6,767	53.1	(D) Larsen, Richard S.	1,750

State Rep. Dist. 26	(1)	100.0		Council Hawaii-Kohala	(1)	100.0
(D) Yuen, Jann L.		3,917	61.2	(D) Sameshima, Munco		17,322
(R) Stevens, Ken		2,166	33.8	(R) Kimura, Hisao		12,813
State Rep. Dist. 27	(3)	100.0		Council Hawaii-Hilo	(1)	100.0
(D) Kawakami, Richard A.		9,165	57.9	(D) Lai, Merle K.		22,532
(D) Kunimura, Tony T.		9,030	57.0	(R) Demello, Lawrence B.		5,634
(D) Yamada, Dennis R.		8,700	54.9	(P) Akaka, Moanikeala E.		3,429
(R) Medeiros, Edward		6,459	40.8	Mayor of Maui	(1)	100.0
Mayor of Hawaii	(1)	100.0		(D) Cravalho, Elmer F.		12,968
(D) Matayoshi, Herbert T.		18,069	52.3	(R) Molina, Frank R.		5,204
(R) Chong, Wing Kong		15,019	43.4	(I) Nishiki, Wayne K.		4,365
Council Hawaii-NDR	(3)	100.0		Council of Maui	(9)	100.0
(D) Tajiri, Harvey S.		20,548	59.5	(D) Nakasone, Bob	MAU	12,927
(D) Yamashiro, Steven K.		17,671	51.1	(D) Medina, Rick C.	MAU	12,925
(R) Garcia Jr., Joseph R.		16,586	48.0	(D) Aiona, Abraham	MAU	12,797
(D) Yadao, Josephine R.		15,589	45.1	(R) Amaral, Alvin T.	MAU	12,647
(R) Edwards, Richard G.		9,387	27.1	(D) Nemoto, Calvin	MAU	10,912
Council Hawaii-Puna	(1)	100.0		(R) Ansai, Toshi	MAU	10,894
(D) Fujii, Tomio		19,522	56.5	(D) Molina, Manuel S.	MAU	10,797
(R) Kelly, James W.N.		10,231	29.6	(D) Morisaki, Lanny	MAU	10,336
Council Hawaii-Kau	(1)	100.0		(D) Cloney, E. Loy	MOL	8,720
(R) Dahlberg, Jim		15,534	44.9	(D) Bulgo, Joe	MAU	8,654
(D) Baolig Jr., Andres		15,513	44.9	(D) Hokama, Goro	LAN	7,672
				(R) Hera, Robert	LAN	6,461
				(R) Lightfoot, Blake	MOL	4,545
				(R) Leong, Sid	MAU	3,314

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1976

				(I) Loban, Vincent	1,205	7.6
				(R) Hay, Frank D.	1,012	6.3
				[Material Deleted]		
<hr/>						
Council of Maui (Cont.)						
(N)	Abraham, James M.	MAU	2,582	10.5		
(P)	Sydney, Suzanne	MAU	2,388	9.7		
(I)	Giazzon, Paul A.	MAU	1,986	8.1		
Mayor-C&C of Hon			(1)	100.0		
(D)	Fasi, Frank F.		137,911	58.9		
(R)	Clement, Dan		82,595	35.2		
(I)	Moore, John		4,159	1.7		
Mayor of Kauai			(1)	100.0		
(D)	Malapit, Eduardo E.		8,902	56.2		
(R)	Blake, Hartwell K.		5,827	36.8		
Council Kauai			(7)	100.0		
(D)	Yukimura, Joann A.		8,987	56.7		
(R)	Sarita, Eddie Labez		7,792	49.2		
(D)	Yotsuda, Robert K.		7,672	48.4		
(D)	Fernandes, Billy E.		7,275	45.9		
(D)	Hew, Jerome		7,155	45.2		
(D)	Tsuchiya, Burt K.		6,899	43.6		
(D)	Gonsalves, Louie		6,643	41.9		
(D)	Baptiste, Stanley L.		6,518	41.1		
(R)	Medeiros, Abel		6,165	38.9		
(R)	McDonald, John		2,879	18.1		
(R)	McElgunn, Gloria E.		1,844	11.6		
(I)	McCarthy, Tom		1,305	8.2		

Result of Votes Cast

General Election

Tuesday, November 7, 1978

State of Hawaii

Prepared by

Office of the Lieutenant Governor
Lieutenant Governor Nelson K. Doi

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 7, 1978

Rep. to Congress CD 1	100.0	State Sen. Dist. 2	(2)	100.0
(D) Hefiel, Cecil	84,552	(D) Takitani, Henry	13,990	57.8
(R) Spillane, Bill	24,470	(D) Yamasaki, Mamoru	13,537	55.9
(L) Larsen, Pete	4,295	(R) Shanaman, Doug	8,502	35.1
(A) Figueroa, Debra	2,095	BLNK= 2,294/ 9.4 OVR=	2/	0.0
BLNK= 14,029/ 10.7 OVR=	490/	State Sen. Dist. 3	(3)	100.0
Rep. to Congress CD 2		(R) Anderson, D. G.	24,068	66.0
(D) Akaka, Daniel K.	118,272	(R) George, Mary	21,468	58.9
(R) Isaak, Charles	15,697	(R) Ajifu, Ralph Kanichi	20,741	56.9
(L) Fritts, Amelia Lew	3,988	(D) Hulten, John J.	18,021	49.4
BLNK= 24,552/ 15.0 OVR=	246/	(D) Wetzell, Robert E.	6,844	18.7
Governor/Lt. Governor		BLNK= 1,191/ 3.2 OVR=	16/	0.0
(D) Ariyoshi/King	153,394	State Sen. Dist. 4	(4)	100.0
(R) Leopold/Isbell	124,610	(D) Cayetano, Ben	40,031	74.4
(N) Leota/Taylor	1,982	(D) Kuroda, Joe	38,432	71.5
(L) Reeser/Silva	1,059	(D) Young, Patsy Kikue	37,273	69.3
(A) Moore/Goldstein	542	(D) Mizuguchi, Norman	33,563	62.4
BLNK= 7,664/ 2.6 OVR=	3435/	(R) Ragasa, Pol R.	12,579	23.4
State Sen. Dist. 1	(3)	(R) Berge, Fred E.	7,091	13.1
(D) Ushijima, John	19,755	(R) Conger, Robert	5,098	9.4
(D) Hara, Stanley I.	17,535	BLNK= 1,377/ 2.5 OVR=	51/	0.0
(D) Carpenter, Dante K.	17,482			
(R) Henderson, Richard	17,154			
BLNK= 746/ 2.2 OVR=	15/			

State Sen. Dist. 5	(4)	100.0	State Sen. Dist. 8	(1)	100.0
(D) Campbell, Charles M.	26,960	60.6	(D) Toyofuku, George H.	9,721	60.8
(D) Kawasaki, Duke	26,270	59.1	BLNK= 6,337/ 39.6 OVR=	0/	0.0
(D) Wong, Richard	25,504	57.4	State Rep. Dist. 1	(1)	100.0
(D) Yim, T. C.	24,151	54.3	(D) Suwa, Jack K.	4,860	65.9
BLNK= 4,183/ 9.4 OVR=	0/	0.0	(R) Pulham, Floyd W.	2,015	27.3
State Sen. Dist. 6	(4)	100.0	BLNK= 491/ 6.6 OVR=	3/	0.0
(R) Yee, Wadsworth	21,377	53.5	State Rep. Dist. 2	(2)	100.0
(D) Abercrombie, Neil	19,681	49.2	(D) Segawa, Herbert A.	8,410	66.7
(R) Carroll, John S.	19,172	47.9	(D) Yamada, Kats	8,055	63.9
(D) Chong, Anson	18,529	46.3	(R) Akana, Bernard K.	3,105	24.6
(R) Kobayashi, Ann H.	17,783	44.5	BLNK= 959/ 7.6 OVR=	3/	0.0
(D) Ando, Richard E.	15,826	39.6	State Rep. Dist. 3	(1)	100.0
(D) Shim, Marion Heen	15,584	39.0	(D) Takamine, Yoshito	4,125	70.3
BLNK= 908/ 2.2 OVR=	43/	0.1	BLNK= 1,735/ 29.6 OVR=	0/	0.0
State Sen. Dist. 7	(4)	100.0	State Rep. Dist. 4	(1)	100.0
(D) Cobb, Steve	30,575	67.8	(D) Inaba, Minoru	4,934	70.3
(R) Saiki, Patricia	27,901	61.9	BLNK= 2,084/ 29.6 OVR=	0/	0.0
(D) O'Connor, Dennis	27,807	61.7	State Rep. Dist. 5	(2)	100.0
(R) Soares, W. Buddy	22,678	50.3	(D) Crozier, Chris	6,171	48.5
(D) Nishimura, Donald S.	18,359	40.7	(D) Machida, Gerald K.	6,089	47.9
(D) Fanning, Carol	12,153	26.9	(R) Monapan, Bill	6,080	47.8
(R) Thiessen, Wayne C.	6,287	13.9	(R) Howden, Michael S.	2,296	18.0
(R) Offer, Emil A.	4,046	8.9	BLNK= 633/ 4.9 OVR=	12/	0.0
BLNK= 920/ 2.0 OVR=	63/	0.1			

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 7, 1978

State Rep. Dist. 6	(2)	100.0	State Rep. Dist. 11	(2)	100.0
(D) Takitani, Anthony		7,510	(R) Lacy, Paul L.		5,244
(D) Honda, Herbert J.		6,838	(R) Kahalii, Kina'u Boyd		5,151
BLNK= 2,210/ 19.2 OVR=		0/	(D) Shon, Jim		3,359
State Rep. Dist. 7	(2)	100.0	(D) Fritz, John		1,232
(R) Ikeda, Donna R.		8,395	BLNK= 705/ 7.8 OVR=	11/	0.1
(D) Dods, Robert D.		7,144	State Rep. Dist. 12	(2)	100.0
(R) Hemmings, Fred, Jr.		6,745	(D) Uwaine, Clifford T.		6,798
(D) Holt-Kay, Emmet		1,697	(D) Hagino, Dave		6,359
BLNK= 321/ 2.4 OVR=	3/	0.0	(R) McGregor, Bob		1,726
State Rep. Dist. 8	(2)	100.0	(R) Simutis, Frank		1,034
(R) Marumoto, Barbara C.		6,416	BLNK= 570/ 6.2 OVR=	3/	0.0
(D) Larsen, Jack		5,468	State Rep. Dist. 13	(3)	100.0
(D) Chu, Rai Saint		4,562	(D) Ushijima, Charles T.		9,538
(R) Steiner, Keith J.		3,967	(D) De Heer, Gerald		9,486
BLNK= 386/ 3.3 OVR=	1/	0.0	(D) Fukunaga, Carol		8,277
State Rep. Dist. 9	(2)	100.0	(R) Gibbs, Douglas		5,262
(D) Say, Calvin K. Y.		7,981	(R) Bartz, Ellwood Lewis		3,033
(D) Morioka, Ted		6,594	BLNK= 852/ 5.4 OVR=	11/	0.0
(R) Goodness, Guy N.		2,243	State Rep. Dist. 14	(2)	100.0
BLNK= 494/ 4.8 OVR=	1/	0.0	(D) Blair, Russell		6,645
State Rep. Dist. 10	(2)	100.0	(D) Stanley, Kathleen		6,424
(D) Kiyabu, Ken		7,221	BLNK= 2,018/ 21.0 OVR=	0/	0.0
(D) Kobayashi, Bert		6,248			
BLNK= 1,763/ 17.7 OVR=	0/	0.0			

State Rep. Dist. 15	(2)	100.0	State Rep. Dist. 20	(2)	100.0
(R) Sutton, Richard Ike		6,218	(D) Kihano, Daniel		9,977
(D) Baker, Byron W.		6,102	(D) Shito, Mitsuo		9,732
(D) Kimura, Robert		6,035	(R) Harper, Raphael S.		2,796
BLNK= 372/ 3.3 OVR=	10/	0.0	BLNK= 1,050/ 7.4 OVR=	0/	0.0
State Rep. Dist. 16	(2)	100.0	State Rep. Dist. 21	(2)	100.0
(R) Narvaes, Tony		5,922	(D) Aki, James		7,893
(D) Holt, Milton		5,802	(D) Peters, Henry H.		7,486
(D) Nakasato, Dennis M.		5,021	(R) Ah Sing, Eli		4,836
BLNK= 516/ 4.9 OVR=	13/	0.1	BLNK= 547/ 4.5 OVR=	5/	0.0
State Rep. Dist. 17	(2)	100.0	State Rep. Dist. 22	(2)	100.0
(D) Garcia, Richard		6,078	(D) Nakamura, Yoshio		6,555
(D) Lee, Kenneth		5,866	(D) Lunasco, Oliver P.		5,754
(R) Orpilla, Samuel En		4,112	(R) Anae, Famika		4,057
(R) Ngai, Spencer O. S.		1,339	BLNK= 476/ 4.6 OVR=	2/	0.0
BLNK= 871/ 7.7 OVR=	24/	0.2	State Rep. Dist. 23	(1)	100.0
State Rep. Dist. 18	(2)	100.0	(D) Toguchi, Charles T.		5,426
(D) Uechi, Mitsuo		7,803	BLNK= 1,606/ 22.8 OVR=	0/	0.0
(D) Wakatsuki, James H.		6,752	State Rep. Dist. 24	(2)	100.0
(R) Lai, Willie		3,504	(D) Ige, Marshall Kaoru		6,976
BLNK= 819/ 7.1 OVR=	3/	0.0	(R) Evans, Faith P.		6,607
State Rep. Dist. 19	(2)	100.0	(D) Chung, Kayo R.		3,833
(D) Hashimoto, Clarice Y.		10,284	(R) Olson, O. P.		3,493
(D) Masutani, Donald, Jr.		9,965	BLNK= 298/ 2.5 OVR=	45/	0.3
BLNK= 2,514/ 16.8 OVR=	0/	0.0			

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 7, 1978

State Rep. Dist. 25	(2)	100.0	Council Dist. 5	(1)	100.0
(R) Medeiros, John J.	6,646	64.3	(D) Nekota, Tom T.	13,179	61.0
(R) Anderson, Whitney T.	5,416	52.4	(R) Stark, Kathryn Lee	5,127	23.7
(D) Aweau, Norman E. P.	3,327	32.1	BLNK= 3,271/ 15.1 OVR=	9/	0.0
(D) Kakalia, Clara L.	3,011	29.1	Council Dist. 6	(1)	100.0
BLNK= 409/ 3.9 OVR=	46/	0.4	(R) Fong, Jr., Hiram L.	9,895	47.5
State Rep. Dist. 26	(1)	100.0	(D) Callan, Dennis	8,936	42.9
(D) Sakamoto, Russell J.	3,158	51.2	BLNK= 1,950/ 9.3 OVR=	10/	0.0
(R) Eastvold, Don	2,714	44.0	Council Dist. 8	(1)	100.0
BLNK= 283/ 4.5 OVR=	2/	0.0	(D) Loo, Frank W. C.	11,909	51.7
State Rep. Dist. 27	(3)	100.0	(R) Oshiro, Tom	8,536	37.0
(D) Kunimura, Tony T.	9,967	62.3	BLNK= 2,551/ 11.0 OVR=	19/	0.0
(D) Kawakani, Richard A.	9,844	61.6	Maui Council E. Maui	(1)	100.0
(D) Yamada, Dennis R.	9,742	60.9	(R) Barr, Allen W.	10,607	44.0
BLNK= 3,730/ 23.3 OVR=	0/	0.0	(D) Nemoto, Calvin S.	10,493	43.6
Council Dist. 2	(1)	100.0	BLNK= 2,951/ 12.2 OVR=	13/	0.0
(D) Matsumoto, Toraki	15,183	56.5	Maui Council C. Maui	(3)	100.0
(R) Lau, Milton	8,737	32.5	(D) Nakasone, Bob	12,836	53.3
BLNK= 2,946/ 10.9 OVR=	3/	0.0	(R) Ansai, Toshi	12,422	51.6
Council Dist. 3	(1)	100.0	(D) Medina, Rick Carabao	11,741	48.7
(R) Poepoe, Andy	15,465	62.3	(D) Murayama, Shigeto	10,334	42.9
(D) Pico, Jr., Tom	7,549	30.4	(R) Meyer, Marco M.	5,435	22.5
BLNK= 1,797/ 7.2 OVR=	8/	0.0	(R) Crawford, Matthew E.	3,442	14.3
			BLNK= 1,086/ 4.5 OVR=	95/	0.3

[Material Deleted]

Council-Kauai	(7)	100.0
(D) Yadao, Rodney B.	8,744	54.7
(D) Yukimura, Joann A.	8,302	51.9
(D) Yotsuda, Robert K.	7,580	47.4
(R) Sarita, Eddie Labez	7,172	44.8
(D) Baptiste, Stan L.	7,085	44.3
(D) Hew, Jerome	6,923	43.3
(D) Tsuchiya, Burt K.	6,825	42.7
(R) Medeiros, Abel	6,064	37.9
(D) Fernandes, Billy E.	5,805	36.3
(R) Martin, Kenneth M.	4,578	28.6
(R) McElgunn, Gloria E.	1,714	10.7
(R) Cabral, Manuel R.	1,552	9.7
(R) Ford, Herbert Alvin	608	3.8
BLNK= 321/ 2.0 OVR=	30/	0.1
School Brd. Dist. 1	(7)	100.0
(D) Aiona, Darrow L. K.	109,195	49.7
(D) Saunders, Marion	106,906	48.6
(D) Apo, Margaret K.	105,728	48.1
(D) Minn, Hubert P.	99,190	45.1
(D) Takenaka, Howard I.	94,149	42.8
(D) Okamura, Tom	89,257	40.6
(D) Kawahara, Hatsuko F.	88,343	40.2
(R) Hall, James V.	70,924	32.2
(R) Gibson, Theodore W.	70,323	32.0
(L) Russell, Mike	49,676	22.6
BLNK= 28,346/ 12.9 OVR=	196/	0.0

Result of Votes Cast
General Election
Tuesday, November 4, 1980
State of Hawaii

Prepared by
Office of the Lieutenant Governor
Lieutenant Governor Jean King

GENERAL ELECTION--STATE OF HAWAII--NOVEMBER 4, 1980

President/Vice President	100.0/100.0 241/241/241	Rep to Congress CD 2	100.0/100.0 150/150/150
(D) Carter/Mondale	135,879 42.7	(D) Akaka, Daniel K.	141,477 77.9
(R) Reagan/Bush	130,112 40.9	(L) Smith, D. Gordon	15,903 8.7
(I) Anderson/Lucey	32,021 10.0	Blank Votes	23,926 13.1
(L) Clark/Koch	3,269 1.0	Over Votes	124 0.0
(C) Commoner/Harris	1,548 0.4	State Sen. Dist. 1	(2)
(H) Hall/Davis	458 0.1		100.0/100.0
Blank Votes	12,207 3.8		52/52/52
Over Votes	2,591 0.8	(D) Carpenter, Dante K.	20,980 54.6
U.S. Senate	100.0/100.0	(R) Henderson, Richard	19,074 49.6
	241/241/241	(D) Yamada, Kats	18,203 47.4
(D) Inouye, Daniel K.	224,485 70.5	Blank Votes	1,161 3.0
(R) Brown, Cooper	53,068 16.6	Over Votes	6 0.0
(L) Shasteen, Bud	10,453 3.2	State Sen. Dist. 2	(1)
Blank Votes	29,758 9.3	4 Yr. Term	100.0/100.0
Over Votes	321 0.1		31/31/31
Rep. to Congress CD 1	100.0/100.0	(D) Yamasaki, Mamoru	17,153 62.7
	91/91/91	Blank Votes	10,201 37.2
(D) Heftel, Cec	98,256 71.9	Over Votes	0 0.0
(R) Noble, Aloma Keen	19,819 14.5	State Sen. Dist. 2	(1)
(L) Johnson, Rockne H.	5,106 3.7	2 Yr. Term	100.0/100.0
Blank Votes	13,330 9.7		31/31/31
Over Votes	144 0.1	(D) Machida, Gerald K.	14,992 54.8
		(R) Molina, Frank R.	8,025 29.3
		Blank Votes	4,321 15.7
		Over Votes	16 0.0

State Sen. Dist. 3	(2)	(L) Mills, John	2,177 5.1
(R) George, Mary		Blank Votes	1,784 4.1
(R) Ajifu, Ralph Kanichi		Over Votes	76 0.1
(D) Morse, Jack C.		State Sen. Dist. 7	(2)
Blank Votes			100.0/100.0
Over Votes			32/32/32
State Sen. Dist. 4	(2)	(D) O'Connor, Dennis	32,498 69.7
		(R) Soares, W. Buddy	27,412 58.8
(D) Young, Patsy Kikue		Blank Votes	6,122 13.1
(D) Mizuguchi, Norman		Over Votes	0 0.0
Blank Votes		State Rep. Dist. 1	(1)
Over Votes			100.0/100.0
State Sen. Dist. 5	(2)		11/11/11
		(D) Levin, Andy	7,195 79.7
(D) Holt, Milton		Blank Votes	1,829 20.2
(D) Wong, Richard		Over Votes	0 0.0
Blank Votes		State Rep. Dist. 2	(2)
Over Votes			100.0/100.0
State Sen. Dist. 6	(2)		14/14/14
		(D) Matsuura, Richard M.	8,395 62.6
(D) Uwaine, Clifford T.		(D) Segawa, Herbert A.	7,674 57.2
(R) Kobayashi, Ann		(R) Desha, Pitlani C.	4,020 30.0
(R) Carroll, John S.		(R) Sherrard, Joseph	1,456 10.8
(D) Chong, Anson		Blank Votes	626 4.6
		Over Votes	14 0.1

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1980

State Rep. Dist. 3	(1)	100.0/100.0 14/14/14	Blank Votes Over Votes	1,645 0	12.8 0.0
(D) Takamine, Yoshito		4,606			
Blank Votes		1,515			
Over Votes		0			
State Rep. Dist. 4	(1)	100.0/100.0 13/13/13	Blank Votes Over Votes	100.0/100.0 10/10/10	
(R) Isbell, Virginia		4,577	(R) Ikeda, Donna R.	8,619	59.0
(D) Inaba, Minoru		6,391	(D) Dods, Robert D.	6,973	47.7
(L) Keefe, James Michael		448	(D) Stegmaier, David D.	6,563	44.9
Blank Votes		387	(R) Endrizal, Beverly W.	3,644	24.9
Over Votes		46	Blank Votes	414	2.8
State Rep. Dist. 5	(2)	100.0/100.0 15/15/15	Blank Votes Over Votes	100.0/100.0 7/7/7	
(D) Andrews, Mark J.		7,992	(R) Rohlfing, Fred W.	8,809	74.1
(R) Monahan, Bill		6,360	(R) Marumoto, Barbara C.	8,173	68.8
(D) Crozier, Chris		6,213	(L) Mason, George W.	1,492	12.5
Blank Votes		1,356	Blank Votes	1,037	8.7
Over Votes		1	Over Votes	2	0.0
State Rep. Dist. 6	(2)	100.0/100.0 16/16/16	Blank Votes Over Votes	100.0/100.0 8/8/8	
(D) Takitani, Anthony		7,877	(D) Say, Calvin K. Y.	7,798	76.1
(D) Honda, Herbert J.		7,183	(D) Morioka, Ted	6,618	64.6
(R) Nickolas, Steven P.		2,385	Blank Votes	1,191	11.6
			Over Votes	0	0.0

State Rep. Dist. 10	(2)	100.0/100.0 7/7/7	Blank Votes Over Votes	100.0/100.0 7/7/7	
(D) Kiyabu, Ken		7,375	(D) Blair, Russell	6,914	67.5
(D) Kobayashi, Bertrand		5,857	(D) Stanley, Kathleen	6,696	65.4
Blank Votes		1,706	(R) Du Bois, Donald	2,239	21.8
Over Votes		0	Blank Votes	1,051	10.2
State Rep. Dist. 11	(2)	100.0/100.0 6/6/6	Blank Votes Over Votes	100.0/100.0 8/8/8	
(R) Kamali'i, Kina'u B.		6,698	(D) Baker, Byron W.	5,286	46.1
(R) Lacy, Paul L.		6,420	(R) Liu, Michael Minoru	5,091	44.4
Blank Votes		2,400	(D) Tam, Rod	4,830	42.1
Over Votes		0	(R) Sutton, Richard Ike	4,826	42.1
State Rep. Dist. 12	(2)	100.0/100.0 7/7/7	Blank Votes Over Votes	100.0/100.0 8/8/8	
(D) Hagino, Dave		6,740	Blank Votes	391	3.4
(D) Hirono, Mazie		6,068	Over Votes	11	0.0
Blank Votes		1,668	State Rep. Dist. 16	100.0/100.0	
Over Votes		0		8/8/8	
State Rep. Dist. 13	(3)	100.0/100.0 9/9/9	Blank Votes Over Votes	100.0/100.0 8/8/8	
(D) Fukunaga, Carol		10,554	(R) Narvaes, Tony	6,391	59.6
(D) De Heer, Gerald		9,646	(D) Nakasato, Dennis M.	6,198	57.8
(D) Taniguchi, Brian T.		9,616	(D) Yap, Ted	3,993	37.2
(R) Chong, Howard K., Jr.		5,868	Blank Votes	546	5.0
Blank Votes		1,126	Over Votes	4	0.0
Over Votes		0			

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1980

State Rep. Dist. 17	(2)	100.0/100.0 8/8/8	State Rep. Dist. 21	(2)	100.0/100.0 7/7/7
(D) Albano, Gene	7,548	60.7	(D) Peters, Henry H.	9,523	72.8
(D) Waihee, John	7,512	60.4	(D) Aki, James	9,032	69.0
Blank Votes	1,999	16.0	Blank Votes	1,520	11.6
Over Votes	0	0.0	Over Votes	0	0.0
State Rep. Dist. 18	(2)	100.0/100.0 8/8/8	State Rep. Dist. 22	(2)	100.0/100.0 8/8/8
(D) Chun, Connie	8,801	72.2	(D) Hagino, Gerald T.	7,493	70.9
(D) Okamura, Tom	8,164	66.9	(D) Nakamura, Yoshio	6,808	64.4
Blank Votes	1,297	10.6	Blank Votes	1,337	12.6
Over Votes	0	0.0	Over Votes	0	0.0
State Rep. Dist. 19	(2)	100.0/100.0 7/7/7	State Rep. Dist. 23	(1)	100.0/100.0 4/4/4
(D) Hashimoto, Clarice Y.	12,324	75.0	(D) Toguchi, Charles T.	6,219	80.7
(D) Tungpalan, Eloise Y.	11,451	69.6	Blank Votes	1,481	19.2
Blank Votes	1,921	11.6	Over Votes	0	0.0
Over Votes	0	0.0	State Rep. Dist. 24	(2)	100.0/100.0 6/6/6
State Rep. Dist. 20	(2)	100.0/100.0 10/10/10	(R) Wong, Jimmy	7,668	59.8
(D) Kihano, Daniel	11,135	69.5	(D) Ige, Marshall Kaoru	7,212	56.3
(D) Shito, Mitsuo	11,125	69.5	(R) Evans, Faith P.	6,751	52.7
Blank Votes	2,199	13.7	Blank Votes	364	2.8
Over Votes	0	0.0	Over Votes	3	0.0

State Rep. Dist. 25	(2)	100.0/100.0 7/7/7	Hawaii Council NDR	(3)	100.0/100.0 52/52/52
(R) Medeiros, John J.	8,366	72.6	(D) Hale, Helene	21,010	54.7
(R) Anderson, Whitney T.	8,286	71.9	(D) De Luz, Frank III	19,532	50.8
(L) McConkey, Harry L.	1,464	12.7	(D) Yamashiro, Stephen K.	18,897	49.2
Blank Votes	1,025	8.9	(R) Akana, Bernard K.	11,449	29.8
Over Votes	1	0.0	(R) Medeiros, Clarence	10,477	27.2
State Rep. Dist. 26	(1)	100.0/100.0 3/3/3	Blank Votes	2,406	6.2
(D) Sakamoto, Russell J.	3,604	53.9	Over Votes	14	0.0
(R) Kaonohi, Leighton K.	2,731	40.8	Hawaii Council KAU	(1)	100.0/100.0 52/52/52
Blank Votes	341	5.1	(R) Dahlberg, Jim	19,108	49.7
Over Votes	4	0.0	(D) Toguchi, Thomas T.	13,921	36.2
State Rep. Dist. 27	(3)	100.0/100.0 13/13/13	Blank Votes	5,356	13.9
(D) Kawakami, Richard A.	9,736	54.4	Over Votes	9	0.0
(D) Kunimura, Tony T.	9,689	54.2	Hawaii Council Puna	(1)	100.0/100.0 52/52/52
(D) Yamada, Dennis R.	9,629	53.8	(D) Fujii, Tomio	20,998	54.6
Blank Votes	5,524	30.9	(R) Reed, Robert I.	9,829	25.6
Over Votes	0	0.0	Blank Votes	7,564	19.7
Hawaii Mayor	100.0/100.0 52/52/52		Over Votes	3	0.0
(D) Matayoshi, Herbert T.	21,603	56.2	Maui Council NDR	(2)	100.0/100.0 30/30/30
(R) Ferreira, Abel J., Sr.	11,774	30.6	(D) Nakasone, Bob	14,889	54.6
Blank Votes	5,011	13.0	(D) Aiona, Abe	12,623	46.3
Over Votes	6	0.0			

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1980

Maui Council NDR (Cont.)			Maui Council West		
(R) Johnson, Dale M.	6,948	25.5	(1)	100.0/100.0	
(N) Hustace, Maria M.	4,108	15.0		30/30/30	
(R) Royal, Roi	2,781	10.2	(D) Kihune, Howard S.	12,117	44.4
Blank Votes	2,550	9.3	(R) Mahoe, Hazel	8,719	32.0
Over Votes	56	0.2	Blank Votes	6,391	23.4
			Over Votes	11	0.0
Maui Council Central			Maui Council Molokai		
(3)	100.0/100.0		(1)	100.0/100.0	
	30/30/30			30/30/30	
(D) Nishiki, Wayne K.	13,423	49.2	(R) Lingle, Linda	10,780	39.5
(R) Ansai, Toshi	12,339	45.3	(D) Acoba, Mariano	9,846	36.1
(D) Medina, Rick	11,942	43.8	Blank Votes	6,590	24.1
(D) Liu, Lee	10,302	37.8	Over Votes	22	0.0
(R) Yamamoto, Munco K.	6,501	23.8	Honolulu Mayor	100.0/100.0	
(R) Barrow, Ron	3,668	13.4		145/145/145	
(L) Schmidt, Ward L.	1,688	6.1	(D) Anderson, Eileen R.	152,240	64.9
Blank Votes	1,626	5.9	(R) Schweigert, Jack	58,155	24.8
Over Votes	47	0.1	(N) Leialoha, William N.	5,595	2.3
Maui Council East			(L) Seavey, Jan E.	3,418	1.4
(1)	100.0/100.0		Blank Votes	14,842	6.3
	30/30/30		Over Votes	160	0.0
(R) Barr, Allen W.	12,124	44.5	Honolulu Pros. Atty.	100.0/100.0	
(D) Franco, Kathleen	9,538	35.0		145/145/145	
Blank Votes	5,563	20.4	(R) Marsland, Charles F.	150,299	64.1
Over Votes	13	0.0	(D) Spencer, Lee	73,433	31.3

Honolulu Pros. Atty. (Cont.)			Yonamine, Noboru		
Blank Votes	10,634	4.5		61,191	26.1
Over Votes	44	0.0	Kawahara, Hatsuko F.	58,911	25.1
Kauai Mayor	100.0/100.0		Nakamatsu, Janie	55,839	23.8
	13/13/13		Leong, June C.	55,562	23.7
(D) Malapit, Eduardo E.	10,296	57.6	Yamashita, Hiroshi	55,247	23.6
(R) Sousa, John	4,552	25.4	Minn, Hubert P.	51,022	21.8
Blank Votes	3,008	16.8	Saunders, Marion	49,408	21.1
Over Votes	12	0.0	Takenaka, Howard I.	47,447	20.2
Kauai Councilmen			Wong, Tommy	42,152	18.0
(7)	100.0/100.0		Norwood, Chuck	40,373	17.2
	13/13/13		Carter, George B.	37,967	16.2
(D) Harris, Jeremy	10,412	58.2	Woods, William	32,717	13.9
(R) Sarita, Eddie Labez	9,839	55.0	Bryan, Kathleen	32,434	13.8
(D) Asing, Bill	9,660	54.0	Arnold, Virginia Chang	31,369	13.4
(D) Yotsuda, Robert K.	8,985	50.2	Everly, Hubert V.	29,649	12.6
(D) Fukushima, Jesse	8,848	49.5	Tumaoder, John	29,177	12.4
(D) Hew, Jerome	8,771	49.0	Powell, Anna S.	26,758	11.4
(D) Yadao, Rodney B.	8,745	48.9	Merchant, Joel L.	15,489	6.6
(R) Medeiros, Abel	7,569	42.3	Seaman, Tobias	11,274	4.8
(D) Baptiste, Stan L.	7,031	39.3	Verhusen, Ben L.	8,798	3.7
Blank Votes	561	3.1	Spoehr, Hardy	7,845	3.3
Over Votes	23	0.1	Criz, A. Joel	7,469	3.1
Ist SB Dist.-NDR			Blank Votes	33,529	14.3
(6)	100.0/100.0		Over Votes	1,373	0.5
	145/145/145				
Apo, Margaret K.	75,840	32.4			
Aiona, Darrow L. K.	65,655	28.0			

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1980

1st SB Dist.—3rd Dist.	(1)	100.0/100.0 145/145/145	Brennan, M. Didi Wilhelm	24,107	10.3
Young, Nancy Foon		48,649	McElhaney, Pua'ala	16,878	7.2
Sakima, Akira		47,163	Mata, Ronald C.	14,475	6.1
Turbin, Richard		25,792	Blank Votes	91,640	39.1
Medina, Revocato		18,592	Over Votes	359	0.1
Stack, Thomas F.		13,465	1st SB Dist.—6th Dist.	(1)	100.0/100.0
Farrell-Viglielmo, F.		7,893	Penébacker, John R.	57,207	24.4
Blank Votes		70,463	Wood, Lynn	23,489	10.0
Over Votes		1,890	Nagatani, Stan	18,762	8.0
1st SB Dist.—4th Dist.	(1)	100.0/100.0 145/145/145	Chung, Kayo R.	17,824	7.6
Araki, Mako		37,866	Larson, Chuck	11,697	5.0
Tongg, Ronnie		33,754	Pico, Tom, Jr.	10,760	4.6
Graham, Morris A.		23,382	Njus, Alice Matayoshi	7,980	3.4
Tyau, Jon Lani		21,004	Fellez, George F., Jr.	4,748	2.0
Berge, Fred E.		13,420	Ottensmeyer, Bob	3,221	1.3
Dykes, Nollie L.		9,949	Pond, Jack	2,209	0.9
Blank Votes		93,551	Blank Votes	74,477	31.8
Over Votes		981	Over Votes	1,533	0.6
1st SB Dist.—5th Dist.	(1)	100.0/100.0 145/145/145	2nd SB Dist.—1st Dist.	(1)	100.0/100.0
Yoshida, Randal		49,548	Waters, Bill Kalae	20,219	24.2
Watumull, Rann J.		36,900	Brown, Leslie W.	15,145	18.1
			Walter, William B.	13,488	16.1
			Hatch, Dan	5,303	6.3

2nd SB Dist.—1st Dist. (Cont.)			Holt, Sam N.	3,523	6.1
Blank Votes		29,041	Akana, Albert	3,343	5.8
Over Votes		312	Burgess, Hayden F.	3,331	5.8
2nd SB Dist.—2nd Dist.	(1)	100.0/100.0 96/96/96	Mossman, Malie I.	3,242	5.6
Ueoka, Meyer M.		25,781	Williams, Ilima Kauka	2,956	5.1
Smith, Roy Chris		18,947	Ching, Clarence	2,564	4.4
Tsubaki, Kiyoto		6,835	Ihara, Violet Ku'ulei P.	2,499	4.3
Tancayo, Michael D., Jr.		5,301	Tiwanak, Eugene Napua	2,401	4.1
Blank Votes		26,253	Hoomanawanui, Mel	2,398	4.1
Over Votes		391	Aweau, Norman Paahana	2,366	4.1
2nd SB Dist.—7th Dist.	(1)	100.0/100.0 96/96/96	Aluli, Kepoikai	2,268	3.9
Hara, Sherwood M.		25,668	Topolinski, John R. K.	2,258	3.9
Duarte, John		19,375	Naki, Tom Kaawa	2,083	3.6
Marchant, Robert N.		10,575	Henrickson, George	2,048	3.5
Blank Votes		27,812	Kalahiki, Melvin D.	1,990	3.4
Over Votes		78	Stagner, Ishmael W.	1,975	3.4
Oha at Lrge Trustees	(4)	100.0/100.0 241/241/241	Hao, Joseph Kamae	1,959	3.4
* DeSoto, Frenchy		9,298	Morrison, Tita Wynne	1,893	3.3
Burgess, Rod K.		5,229	Kanahale, Dennis K.	1,767	3.0
Benham, Roy L.		4,668	Kamana, John Squeeze, Jr.	1,761	3.0
Kaulukukui, Thomas		3,826	Boyd, Stewart K.	1,712	2.9
Lee, Tuck Wah Kalei		3,577	Aiona, George	1,636	2.8
Lum, Eugene K. H.		3,541	Mitchell, Billy K.	1,486	2.5
			Kuloloid, Leslie A.	1,449	2.5
			Chun, Arthur B.	1,448	2.5
			Agard, Buzzy Louis Kane	1,321	2.3
			Solomon, Milton Moanalii	1,253	2.1

* These officials will serve four-year terms. The others will serve two-year terms.

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1980

Kidder, Arnold Kekamalei	1,164	2.0	Kapana, Abraham, Sr.	476	0.8
Bray, Brandon Kalei	1,159	2.0	Kaiu, David	472	0.8
Kalama, Ed Keliikauwila	1,055	1.8	Ono, Solomon P., Sr.	469	0.8
Hew Len, Stanley G.	971	1.6	Bither, S. K. P. Varoa-Tiki	442	0.7
Lee, Adeline Maunupau	941	1.6	Hatchie, Kalani K. J.	435	0.7
Haake, Richard H., Jr.	927	1.5	De Ocampo, Mary Kukahiwa	394	0.6
Akina, Alvin Auhana, Jr.	870	1.5	Huihui, Abel	374	0.6
Hoapili, Clara K.	849	1.4	Lum, Milnor	371	0.6
Aea-Chang, Hansel	830	1.4	Keaulana, Moke	351	0.6
Teves, Kalai Aluli	825	1.4	Huihui, Valentine, Sr.	338	0.5
Makekau, Clint K.	780	1.3	Kekipi, Velma P.	324	0.5
Niheu, Hanalei Kihei	779	1.3	Kekipi, Velma Meyer	309	0.5
Makanui, Barbara J.	715	1.2	Gomez, Margie Iona	281	0.4
Ing, Sterling D.	707	1.2	Kawelo, Frankie Kay	264	0.4
Kanekoa, Mitchell	684	1.1	Kepoo, Arthur O. K. K.	251	0.4
Han, Ronald Paaluhii	681	1.1	Chrones, Philip Landgraf	250	0.4
Hanakahi, L. Kaipo	645	1.1	Jacosalem, Brice Kahoano	241	0.4
Kauuwai, Pearl F. Hipa	628	1.0	Manners, Alexander Louis	237	0.4
Kepoo, Arthur F.	628	1.0	Kanui-Gill, Rita	233	0.4
Alani-Tung Loong, Marvin	568	0.9	Ventura, Roy	176	0.3
Amaral, John Kaluaapa	545	0.9	Manuel, Maximo P.	117	0.2
Kamaunu, Alden H. K.	528	0.9	Blank Votes	1,023	2.3
Nahalea, Nona A.	503	0.8	Over Votes	9,372	21.8
Haugen, Carmen S.	501	0.8			
Kupau, Ellie	487	0.8			
Naumu-Stewart, Judy	486	0.8			

OHA-Res. of Hawaii	(1)	100.0/100.0 241/241/241	OHA-Res. of Maui	(1)	100.0/100.0 241/241/241
* Solomon, Malama		8,801	Kealoha, Joe		7,918
Akaka, Moanikeala		6,673	Maxwell, Charles K.		6,193
Naope, George L.		4,229	Hoopii, Richard K., Sr.		5,155
Napeahi, Abbie		3,681	Lindsey, Mary Helen K.		4,507
Kaupu, Julia K.		1,970	Saffery, Nani Smythe		2,761
Akimseu, Maile Kukahiko		1,714	Kealoha, Samuel L., Jr.		2,721
Chun, Kaliko B.		1,704	Mahoe, Cummins K.		1,732
Kekua, John C., Jr.		1,702	Paahana, Rod Kaahanui		1,589
Kalanui, Gene K.		1,222	Kahawaii, Hamby Akina		1,478
Tom, Keith Kalanimau		1,052	Correa, Walter, Sr.		918
Dart, Nina Kekaula		632	Lee, Harold K.		564
Chang, Art Baxter		573	Blank Votes		7,103
Lee, Tanya Nakea		499	Over Votes		209
Yost, Ralph L.		459			0.4
Blank Votes		7,442	OHA-Res. of Molokai	(1)	100.0/100.0 241/241/241
Over Votes		495			
OHA-Res. of Kauai	(1)	100.0/100.0 241/241/241	* Ritte, Walter L., Jr.		13,502
			Hao, Louis		11,010
* Keale, Moses Moke		12,545	Punikaia, Bernard K.		5,294
Apana, Lovey L.		7,500	Peters, Sam		4,664
Blake, Hartwell K.		7,425	Blank Votes		8,345
Aiu, Danita McGregor		4,060	Over Votes		33
Kapaka, LaFrance Keahi		3,258			0.0
Blank Votes		7,987			
Over Votes		73			

* These officials will serve four-year terms. The others will serve two-year terms.

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1980

[Material Deleted]

OHA—Res. of Oahu	(1)	100.0/100.0 241/241/241
Apo, Peter K.		5,317 12.4
Naluai, Clayton K.		4,811 11.2
Kealoha, Gard		3,685 8.6
Ayau, Henry Keawe, Jr.		3,008 7.0
Napoleon, Nathan Nihi		2,960 6.9
Hookand, Geo		2,610 6.0
Kealoha, Ernest		1,879 4.3
Kahihikolo, Katherine K.		1,320 3.0
Ahmad, Abraham Puhipau A.		1,257 2.9
Kinney, Richard, Jr.		1,070 2.4
Nishimura, Pearl R.		1,046 2.4
Staton, Ihilani Chun		1,019 2.3
Kala, William Kamana, Sr.		996 2.3
Keawe-Aiko, Ed P., Jr.		911 2.1
Gurczynski, Ethel		716 1.6
Noa, Lawrence L.		655 1.5
Kuikahi, Harry Kanalulu		645 1.5
Funn, Vernetta R.		570 1.3
Lau, Charles Kealoha		548 1.2
Kelii, Lester K.		491 1.1
Burrows, Moses M.		449 1.0
Nataniela, C. Ulu-Mamala		123 0.2
Blank Votes		6,299 14.7
Over Votes		463 1.0

Result of Votes Cast

General Election

Tuesday, November 2, 1982

State of Hawaii

Prepared by

Office of the Lieutenant Governor
Lieutenant Governor John Waihee

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1982

U.S. Senate	94.9/100.0	(R) Anderson/Saiki	81,507	25.0
	284/299/299	Blank Votes	12,501	3.8
		Over Votes	1,101	0.3
(D) Matsunaga, Spark	245,386 75.3	State Senate Dist. 3	78.5/100.0	
(R) Brown, Clarence J.	52,071 15.9		22/28/28	
(T) Bernier-Nachtwey, E.	8,953 2.7	(D) Solomon, Malama	7,272 52.9	
Blank Votes	18,747 5.7	(R) Burns, John F., Jr.	5,545 40.3	
Over Votes	298 0.0	Blank Votes	905 6.5	
Rep. to Congress CD 1	100.0/100.0	Over Votes	7 0.0	
	128/128/128	State Senate Dist. 5	89.4/100.0	
(D) Heftel, Cec	134,779 82.4		17/19/19	
(L) Johnson, Rockne H.	15,128 9.2	(D) Machida, Gerald K.	8,880 68.2	
Blank Votes	13,421 8.2	(R) Richesin, Carmie R.	2,692 20.6	
Over Votes	52 0.0	Blank Votes	1,433 11.0	
Rep. to Congress CD 2	91.2/100.0	Over Votes	7 0.0	
	156/171/171	State Senate Dist. 7-2 Yr.	100.0/100.0	
(D) Akaka, Daniel K.	132,072 81.4		12/12/12	
(N) Mills, Greg	9,080 5.6	(D) Cobb, Steve	14,257 79.6	
(L) Fritts, Amelia Lew	6,856 4.2	(R) Porter, David W.	2,555 14.2	
Blank Votes	13,973 8.6	Blank Votes	1,088 6.0	
Over Votes	95 0.0	Over Votes	0 0.0	
Governor/Lt. Governor	94.9/100.0			
	284/299/299			
(D) Ariyoshi/Waihee	141,043 43.3			
(I) Fasi/Piltz	89,303 27.4			

State Senate Dist. 9	100.0/100.0	State Senate Dist. 17	100.0/100.0	
	16/10/10		12/12/12	
(D) Kobayashi, Bert	6,789 50.6	(D) Kuroda, Joe	9,413 76.9	
(R) Kamali'i, Kina'u B.	5,804 43.2	Blank Votes	2,818 23.0	
Blank Votes	812 6.0	Over Votes	0 0.0	
Over Votes	2 0.0	State Senate Dist. 19	100.0/100.0	
State Senate Dist. 11	100.0/100.0		8/8/8	
	10/10/10	(D) Aki, James	7,985 81.7	
(D) Abercrombie, Neil	8,405 60.1	Blank Votes	1,781 18.2	
(R) Yee, Wadsworth	4,986 35.6	Over Votes	0 0.0	
Blank Votes	589 4.2	State Senate Dist. 20	100.0/100.0	
Over Votes	0 0.0		8/8/8	
State Senate Dist. 12	100.0/100.0	(D) Cayetano, Ben	9,513 74.3	
	10/10/10	Blank Votes	3,274 25.6	
(D) Chang, Tony	7,302 52.3	Over Votes	0 0.0	
(R) Liu, Michael Minoru	4,808 34.4	State Senate Dist. 21	100.0/100.0	
(I) Akamine, Ken	1,030 7.3		12/12/12	
Blank Votes	787 5.6	(D) Hagino, Gerald T.	7,778 78.9	
Over Votes	31 0.2	Blank Votes	2,077 21.0	
State Senate Dist. 14	100.0/100.0	Over Votes	0 0.0	
	11/11/11	State Senate Dist. 22	100.0/100.0	
(D) Kawasaki, Duke	7,996 72.8		10/10/10	
Blank Votes	2,974 27.1	(D) Toguchi, Charles T.	6,778 53.9	
Over Votes	0 0.0	(R) Wong, Jimmy	6,168 41.1	
		(L) Seavey, Jan	290 2.2	

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1982

State Senate Dist. 22 (Cont.)		321	2.5			State Rep. Dist. 4		87.5/100.0
Blank Votes								14/16/16
Over Votes		8	0.0			(D) Takamine, Yoshito		4,692 61.4
State Senate Dist. 25		94.4/100.0				(R) Andrade, Ethel		2,560 33.6
		17/18/18				Blank Votes		368 4.8
(D) Fernandes Salling, L.		12,582	69.0			Over Votes		4 0.0
Blank Votes		5,585	30.6			State Rep. Dist. 5		100.0/100.0
Over Votes		0	0.0					9/9/9
State Rep. Dist. 1		100.0/100.0				(D) Matsuura, Richard		4,533 64.5
		7/7/7				(R) Herbst, Art G., Sr.		1,953 27.8
(D) Segawa, Herbert A.		5,881	70.4			Blank Votes		531 7.5
Blank Votes		2,468	29.5			Over Votes		7 0.0
Over Votes		0	0.0			State Rep. Dist. 6		100.0/100.0
State Rep. Dist. 2		69.2/100.0						7/7/7
		9/13/13				(D) Honda, Herbert J.		4,154 50.8
(D) Levin, Andy		5,664	75.7			(R) Amaral, Alvin T.		3,593 43.9
Blank Votes		1,185	15.8			Blank Votes		421 5.1
Over Votes		630	8.4			Over Votes		8 0.0
State Rep. Dist. 3		100.0/100.0				State Rep. Dist. 7		55.5/100.0
		9/9/9						5/9/9
(R) Isbell, Virginia		3,810	50.9			(D) Andrews, Mark J.		5,795 75.3
(D) Sterling, Leon K., Jr.		3,332	44.5			Blank Votes		1,891 24.6
Blank Votes		327	4.3			Over Votes		0 0.0
Over Votes		4	0.0					

State Rep. Dist. 8		75.0/100.0				State Rep. Dist. 12		100.0/100.0
		9/12/12						6/6/6
(D) Souki, Joseph M.		3,587	52.3			(R) Marumoto, Barbara C.		5,104 56.1
(R) Gardner, Tim L.		2,555	37.2			(D) Scanlan, Rags		3,527 38.8
Blank Votes		714	10.4			Blank Votes		456 5.0
Over Votes		1	0.0			Over Votes		1 0.0
State Rep. Dist. 9		88.8/100.0				State Rep. Dist. 13		100.0/100.0
		8/9/9						6/6/6
(D) Hee, Clayton		3,064	46.3			(R) Rohlfing, Fred		5,449 64.6
(R) Helm, Larry		2,484	37.5			(D) Motooka, David Takao		2,546 30.1
(I) Del Rosario, John		551	8.3			Blank Votes		436 5.1
Blank Votes		484	7.3			Over Votes		1 0.0
Over Votes		27	0.4			State Rep. Dist. 14		100.0/100.0
State Rep. Dist. 10		100.0/100.0						5/5/5
		4/4/4				(D) Say, Calvin K.Y.		6,362 86.3
(R) Ikeda, Donna R.		5,471	79.3			Blank Votes		1,002 13.6
Blank Votes		1,427	20.6			Over Votes		0 0.0
Over Votes		0	0.0			State Rep. Dist. 15		100.0/100.0
State Rep. Dist. 11		100.0/100.0						5/5/5
		4/4/4				(D) Kiyabu, Ken		4,771 71.9
(R) Jones, Hal		4,270	50.7			(R) Boyd, Stewart K.		1,472 22.2
(D) Vasconcellos, Kumu		3,681	43.7			Blank Votes		395 5.8
(I) Bernier-Nachtwey, P.		176	2.0			Over Votes		2 0.0
Blank Votes		285	3.3					
Over Votes		4	0.0					

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1982

State Rep. Dist. 16	100.0/100.0 4/4/4	State Rep. Dist. 20	100.0/100.0 6/6/6
(D) Hayes, Joan	2,963 48.0	(D) Hirono, Mazie	3,788 61.9
(R) Lacy, Paul L.	2,787 45.1	(R) Larsen, Ron	1,874 30.6
Blank Votes	418 6.7	Blank Votes	452 7.3
Over Votes	4 0.0	Over Votes	1 0.0
State Rep. Dist. 17	100.0/100.0 4/4/4	State Rep. Dist. 21	100.0/100.0 5/5/5
(D) Hagino, Dave	3,996 71.0	(D) Blair, Russell	4,412 65.6
Blank Votes	1,630 28.9	(R) Chong, Howard, Jr.	1,918 28.5
Over Votes	0 0.0	Blank Votes	391 5.8
State Rep. Dist. 18	100.0/100.0 5/5/5	State Rep. Dist. 22	100.0/100.0 4/4/4
(D) Taniguchi, Brian T.	5,165 65.8	(D) Stanley, Kathleen	3,532 62.4
(R) Nishioka, Ross M.	2,046 26.0	(R) Schuman, Frances K.	1,473 26.0
Blank Votes	632 8.0	Blank Votes	654 11.5
Over Votes	2 0.0	Over Votes	0 0.0
State Rep. Dist. 19	100.0/100.0 5/5/5	State Rep. Dist. 23	100.0/100.0 4/4/4
(R) Dang, Marvin S.C.	4,509 64.5	(D) Tam, Rod	4,727 61.2
(D) Segawa, Ross	1,623 23.2	(R) Sutton, Richard Ike	2,381 30.8
Blank Votes	848 12.1	(I) Johnston, Don	286 3.7
Over Votes	1 0.0	Blank Votes	314 4.0
		Over Votes	5 0.0

State Rep. Dist. 24	100.0/100.0 6/6/6	State Rep. Dist. 28	100.0/100.0 6/6/6
(D) Baker, Byron	4,392 71.3	(D) Gaulty, Reynaldo	3,526 76.2
Blank Votes	1,764 28.6	Blank Votes	1,098 23.7
Over Votes	0 0.0	Over Votes	0 0.0
State Rep. Dist. 25	100.0/100.0 8/8/8	State Rep. Dist. 29	100.0/100.0 2/2/2
(D) Yoshimura, Dwight L.	3,200 58.5	(D) Kim, Donna Mercado	2,658 75.0
(I) Manuel, Gimo M.	1,774 32.4	Blank Votes	883 24.9
Blank Votes	481 8.8	Over Votes	0 0.0
Over Votes	7 0.1	State Rep. Dist. 30	100.0/100.0 5/5/5
State Rep. Dist. 26	100.0/100.0 4/4/4	(D) Chun, Connie	1,707 54.0
(D) Albano, Gene	2,853 64.4	(R) Wightman, Daniel D.	1,278 40.4
(R) Verzon, Johnny I.M.	1,048 23.6	Blank Votes	172 5.4
Blank Votes	517 11.6	Over Votes	2 0.0
Over Votes	9 0.2	State Rep. Dist. 31	100.0/100.0 5/5/5
State Rep. Dist. 27	100.0/100.0 4/4/4	(D) Okamura, Tom	5,298 81.0
(D) Nakasato, Dennis M.	4,236 76.7	(R) Merino, William B.	883 13.5
Blank Votes	1,280 23.2	Blank Votes	355 5.4
Over Votes	0 0.0	Over Votes	0 0.0

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1982

State Rep. Dist. 32	100.0/100.0 4/4/4	State Rep. Dist. 36	100.0/100.0 4/4/4
(D) Hashimoto, Clarice Y.	4,154 76.3	(D) Kiyabu-Saballa, Avis	2,511 71.4
Blank Votes	1,289 23.6	Blank Votes	1,001 28.5
Over Votes	0 0.0	Over Votes	0 0.0
State Rep. Dist. 33	100.0/100.0 3/3/3	State Rep. Dist. 37	100.0/100.0 5/5/5
(D) Morgado, Arnold, Jr.	5,142 75.6	(D) Crozier, Mike	3,447 74.6
Blank Votes	1,652 24.3	Blank Votes	1,173 25.3
Over Votes	0 0.0	Over Votes	0 0.0
State Rep. Dist. 34	100.0/100.0 6/6/6	State Rep. Dist. 38	100.0/100.0 4/4/4
(D) Tungpalan, Eloise Y.	4,582 77.7	(D) Peters, Henry H.	3,662 73.2
Blank Votes	1,313 22.2	(R) Pilllos, Jose	885 17.7
Over Votes	0 0.0	Blank Votes	449 8.9
State Rep. Dist. 35	100.0/100.0 4/4/4	Over Votes	4 0.0
(D) Shito, Mitsuo	3,861 80.3	State Rep. Dist. 39	100.0/100.0 4/4/4
Blank Votes	943 19.6	(D) Menor, Ron	3,936 61.2
Over Votes	0 0.0	(R) Helliwell, Jane	2,328 36.2
		Blank Votes	158 2.4
		Over Votes	1 0.0

State Rep. Dist. 40	100.0/100.0 7/7/7	State Rep. Dist. 44	100.0/100.0 4/4/4
(D) Kihano, Daniel J.	2,643 56.4	(D) Tom, Terrance	3,711 61.2
(R) Weaver, Beatrice	1,644 35.1	(R) Clingan, Nancy H.	2,120 34.9
Blank Votes	393 8.3	Blank Votes	229 3.7
Over Votes	2 0.0	Over Votes	2 0.0
State Rep. Dist. 41	100.0/100.0 5/5/5	State Rep. Dist. 45	100.0/100.0 5/5/5
(D) Bunda, Robert	4,144 79.9	(D) Ige, Marshall	6,001 80.6
(R) Kaneshiro, Kathleen	709 13.6	Blank Votes	1,439 19.3
Blank Votes	331 6.3	Over Votes	0 0.0
Over Votes	0 0.0	State Rep. Dist. 46	100.0/100.0 6/6/6
State Rep. Dist. 42	100.0/100.0 6/6/6	(R) Anderson, Whitney T.	3,334 49.5
(D) Leong, Joe	2,821 60.0	(D) Sakamoto, Russell J.	3,218 47.7
(R) Bolles, Laura Lee	1,624 34.5	Blank Votes	179 2.6
Blank Votes	249 5.2	Over Votes	3 0.0
Over Votes	7 0.1	State Rep. Dist. 47	100.0/100.0 5/5/5
State Rep. Dist. 43	100.0/100.0 4/4/4	(R) Medeiros, John J.	4,617 65.1
(D) Nakata, Bob.	3,857 61.9	(D) Malina-Wright, V.	2,135 30.1
(R) Chong, Jacqueline	2,115 33.9	Blank Votes	331 4.6
Blank Votes	248 3.9	Over Votes	1 0.0
Over Votes	1 0.0		

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1982

State Rep. Dist. 48		100.0/100.0 5/5/5	Maui Mayor	80.5/100.0 29/36/36
(D)	Wong, Norma	4,362	(R) Tavares, Hannibal	15,789
(R)	Isaak, Charles	1,814	(D) Nakasone, Bob	12,421
(I)	Minuth, Fred G.	437	Blank Votes	992
	Blank Votes	264	Over Votes	17
	Over Votes	4		0.0
State Rep. Dist. 49		100.0/100.0 6/6/6	Maui Counc Central (3)	80.5/100.0 29/36/36
(D)	Apo, Peter K.	2,669	(D) Nishiki, Wayne K.	15,318
(R)	Peters, Ron	1,101	(D) Santos, Velma M.	15,259
(I)	Lewis, Jacqueline	741	(D) Liu, E. Lee.	14,075
	Blank Votes	742	(R) Ansai, Toshi	13,510
	Over Votes	6	(R) Halford, Ernest L.	7,000
		100.0/100.0 6/6/6	(R) Calhau, Frederick M.	2,815
State Rep. Dist. 50		100.0/100.0 6/6/6	Blank Votes	1,564
		6/6/6	Over Votes	53
				0.1
(D)	Lardizabal, Alfred C.	5,448	Maui Counc West	80.5/100.0 29/36/36
	Blank Votes	2,751		
	Over Votes	0	(D) Kihune, Howard S.	15,088
State Rep. Dist. 51		87.5/100.0 7/8/8	(R) Clarke, Chuck	7,224
			Blank Votes	6,895
(D)	Kawakami, Richard A.	5,627	Over Votes	12
	Blank Votes	2,543		0.0
	Over Votes	0		

Maui Counc East		100.0/100.0 20/20/20	Hon Counc Dist. III	100.0/100.0 23/23/23
(D)	Ota, Charles S.	12,203	(D) Fawcett, Welcome S.	27,466
(R)	Franco, Norman C.	9,658	(L) Winter, Christopher	3,586
(I)	Sydney, Susanne	2,084	Blank Votes	2,731
	Blank Votes	5,242	Over Votes	2
	Over Votes	32		0.0
Maui Counc Molokai		80.5/100.0 29/36/36	Hon Counc Dist. IV	100.0/100.0 23/23/23
(R)	Lingle, Linda	14,313	(D) Doo, Leigh-Wai	24,511
(D)	Colotario, Regino	7,122	(R) Magee, Christopher W.	4,221
	Blank Votes	7,759	Blank Votes	2,499
	Over Votes	25	Over Votes	4
		100.0/100.0 24/24/24		0.0
Hon Counc Dist. I		100.0/100.0 24/24/24	Hon Counc Dist. V	100.0/100.0 21/21/21
(D)	Matsumoto, Toraki	15,542	(D) Bornhorst, Marilyn	18,934
(R)	Cleveland, Otto	5,672	(R) Fong, Hiram, Jr.	8,129
	Blank Votes	1,833	(N) Christensen, Wade R.	306
	Over Votes	7	(L) Armerding, Ludwig E.	306
		100.0/100.0 22/22/22	Blank Votes	1,033
Hon Counc Dist. II		100.0/100.0 22/22/22	Over Votes	27
				0.0
(R)	Kahanu, David Wilcox	14,221	Hon Counc Dist. VI	100.0/100.0 23/23/23
(D)	Wong, H.	13,900	(R) Narvaes, Tony	16,602
	Blank Votes	1,580	(D) Loo, Frank	9,830
	Over Votes	1	Blank Votes	1,922
			Over Votes	18
				0.1

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 2, 1982

Hon Counc Dist. VIII		100.0/100.0 19/19/19					
(D)	Akahane, George G.	13,963	53.8	(D)	Kouchi, Ronald D.	9,475	51.9
(R)	Haak, David A.	9,593	37.0	(D)	Fukushima, Jesse	8,584	47.1
	Blank Votes	2,361	9.1	(R)	Sarita, Eddie Labez	8,447	46.3
	Over Votes	5	0.0	(D)	Yadao, Rodney B.	8,317	45.6
Hon Counc Dist. IX				(R)	Medeiros, Abel	5,826	31.9
		100.0/100.0 19/19/19		(R)	Medeiros, Tom	5,144	28.2
(D)	Mink, Patsy T.	14,339	73.2	(L)	Dyer, Michael M.	993	5.4
(R)	Latimore, John S.	3,736	19.0	(I)	Littleman, Joe	714	3.9
	Blank Votes	1,505	7.6		Blank Votes	312	1.7
	Over Votes	6	0.0		Over Votes	35	0.1
Kauai Mayor				OHA at Large—4 Yr.		(3)	94.9/100.0
		94.4/100.0 17/18/18					284/299/299
(D)	Kunimura, Tony T.	12,191	66.9		Freitas, Rockne	20,580	48.5
(R)	Sousa, John	3,685	20.2		Burgess, Rod K.	14,792	34.8
	Blank Votes	2,314	12.6		Kealoha, Gard	8,748	20.6
	Over Votes	7	0.0		Hookano, Geo	8,182	19.3
Kauai Councilmen					Williams, Ilima Kauka	6,643	15.6
		94.4/100.0 17/18/18			Blake, Hartwell K.	6,638	15.6
(D)	Ishii, Paula	9,878	54.2		Trask, Arthur Kaukaohu	5,813	13.7
(D)	Duvauchelle, Raymond	9,670	53.0		Hoomanawanui, Mel	4,958	11.6
(D)	Asing, Bill	9,545	52.3		Kupau, Ellamae	4,214	9.9
(D)	Harris, Jeremy	9,510	52.1		Akimseu, E. Maile	4,087	9.6
					Lui-Kwan, Tim	3,758	8.8
					Punikaia, Bernard K.	3,010	7.1
					Kekipi, Velma P.	2,701	6.3

OHA at Large—4 Yr. (Cont.)				OHA Res. Hawaii—2 Yr.		(1)	94.9/100.0
	Kepo'o, Arthur	2,590	6.1				284/299/299
	Tiki, Varda	2,219	5.2		Desha, Piilani C.	12,689	29.9
	Zablan, Liiwela Naukana	2,007	4.7		Kinney, Everett K.	9,086	21.4
	Huihui, Valentine, Sr.	1,913	4.5		Papalimu, Joseph K.	7,971	18.8
	Kaiwi, Ed	1,681	3.9		Chun-Seymour, Kaliko	4,300	10.1
	Prejean, Kawaipunaonakoa	1,681	3.9		Blank Votes	8,211	19.3
	Hatchie, J. Kalani	1,167	2.7		Over Votes	56	0.1
	Blank Votes	1,429	3.3		OHA Res. Maui—4 Yr.	(1)	94.9/100.0
	Over Votes	174	0.4				284/299/299
OHA at Large—2 Yr.					Kealoha, Joe	24,180	57.0
		94.9/100.0 284/299/299			Leialoha, Benn	8,052	18.9
	Kaulukukui, Thomas K.	12,966	30.5		Blank Votes	10,147	23.9
	Lee, Tuck Wah Kalei	5,841	13.7		Over Votes	7	0.0
	Ahuna-Hines, Nickie	4,264	10.0		OHA Res. Oahu—4 Yr.	(1)	94.9/100.0
	Agard, Buzzy Louis	3,141	7.4				284/299/299
	Hughes-Ho, Claire K.	2,889	6.8		Burgess, Hayden F.	13,945	32.8
	Stagner, Ishmael W.	2,437	5.7		Kealoha, Abe Lincoln, Jr.	11,377	26.8
	Kanui-Gill, Rita	1,905	4.4		Kinney, Richard Pomaikai	9,115	21.5
	Park, Alvina Kailihou	1,800	4.2		Blank Votes	7,841	18.4
	Loa, Maui	1,281	3.0		Over Votes	40	0.0
	Blank Votes	5,533	13.0				
	Over Votes	325	0.7				

[Material Deleted]

Results of Votes Cast
General Election
Tuesday, November 6, 1984
State of Hawaii
Statewide Summary Report

Prepared by
Office of the Lieutenant Governor
Lieutenant Governor John Waihee

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

President/Vice President	100.0/100.0 278/278/279	State Senate Dist. 1 100.0/100.0 19/19/19
(R) Reagan/Bush	185,050 52.9	(R) Henderson, Richard 10,041 64.7
(D) Mondale/Ferraro	147,154 42.1	(D) Rothstein, Jerry 3,654 23.5
(L) Bergland/Lewis	2,167 0.6	Blank Votes 1,797 11.5
(P) Hall/Davis A.	821 0.2	Over Votes 4 0.0
(H) Larouche/Davis B.	654 0.1	State Senate Dist. 2 100.0/100.0 12/12/12
Blank Votes 10,735 3.0		
Over Votes 2,846 0.8		
Rep. to Congress CD 1 100.0/100.0 115/115/115		(D) Matsuura, Richard M. 12,036 92.8
(D) Hefel, Cec 114,884 65.1		(R) Douglas, William M. 1,544 10.6
(R) Beard, Will 20,608 11.6		Blank Votes 950 6.5
(L) Winter, Christopher 3,373 1.9		Over Votes 2 0.0
Blank Votes 37,269 21.1		State Senate Dist. 4 100.0/100.0 14/14/14
Over Votes 99 0.0		
Rep. to Congress CD 2 100.0/100.0 162/162/162		(D) Yamasaki, Mamoru 9,490 67.2
		Blank Votes 4,631 32.7
		Over Votes 0 0.0
		State Senate Dist. 9 100.0/100.0 9/9/9
(D) Akaka, Daniel K. 112,377 64.8		
(R) Shipley, A. D. 20,000 11.5		(D) Hee, Clayton 7,695 50.0
(L) Fritts, Amelia Lew 4,364 2.5		(R) Ajifu, Ralph Kanichi 7,214 46.8
Blank Votes 36,255 20.9		Blank Votes 471 3.0
Over Votes 197 0.1		Over Votes 7 0.0

State Senate Dist. 10 100.0/100.0 10/10/10	State Senate Dist. 15 100.0/100.0 10/10/10
(R) George, Mary 7,232 49.9	(D) McMurdo, Mary-Jane 6,456 48.1
(D) Bybee, Ed 6,637 45.8	(R) Champion, Les, Jr. 5,582 41.6
Blank Votes 610 4.2	Blank Votes 1,351 10.0
Over Votes 6 0.0	Over Votes 9 0.0
State Senate Dist. 11 100.0/100.0 9/9/9	State Senate Dist. 18 100.0/100.0 8/8/8
(R) Soares, W. Buddy 12,189 72.4	(D) Holt, Milton A. I. 8,410 70.6
Blank Votes 4,630 27.5	Blank Votes 3,497 29.3
Over Votes 0 0.0	Over Votes 0 0.0
State Senate Dist. 12 100.0/100.0 11/11/11	State Senate Dist. 20 100.0/100.0 9/9/9
(D) Cobb, Steve 12,897 74.3	(D) Wong, Richard 9,647 73.0
(R) Sutton, Warner Kimo 3,121 17.9	(R) Taeu, Junior 2,262 17.1
Blank Votes 1,329 7.6	Blank Votes 1,291 9.7
Over Votes 3 0.0	Over Votes 2 0.0
State Senate Dist. 14 100.0/100.0 9/9/9	State Senate Dist. 21 100.0/100.0 8/8/8
(R) Kobayashi, Ann H. 9,277 64.7	(D) Mizuguchi, Norman 9,428 64.5
(D) Apo, Sam Umi 4,032 28.1	(R) Keiser, Jane P. 4,244 29.0
Blank Votes 1,026 7.1	Blank Votes 941 6.4
Over Votes 3 0.0	Over Votes 0 0.0

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

State Senate Dist. 23		100.0/100.0 9/9/9	State Rep. Dist. 4		100.0/100.0 14/14/14
(D) Young, Patsy Kikue	7,569	75.6	(D) Takamine, Dwight Y.	4,747	74.0
Blank Votes	2,437	24.3	(R) Hooper, James L.	1,069	16.6
Over Votes	0	0.0	Blank Votes	594	9.2
State Rep. Dist. 1	100.0/100.0 10/10/10		Over Votes	1	0.0
(D) Levin, Andy	6,691	81.4	State Rep. Dist. 5	100.0/100.0 9/9/9	
Blank Votes	1,525	18.5	(R) Isaell, Virginia	4,693	64.4
Over Votes	0	0.0	(D) Olson, John L.	2,323	31.9
State Rep. Dist. 2	100.0/100.0 6/6/6		Blank Votes	260	3.5
(D) Tajiri, Harvey S.	5,301	68.4	Over Votes	4	0.0
Blank Votes	2,440	31.5	State Rep. Dist. 6	100.0/100.0 10/10/10	
Over Votes	0	0.0	(D) Lindsey, Robert K.	3,852	51.5
State Rep. Dist. 3	100.0/100.0 6/6/6		(R) O’Kieffe, Mike	3,038	40.6
(D) Metcalf, Wayne	5,467	30.5	Blank Votes	583	7.7
Blank Votes	1,324	19.4	Over Votes	2	0.0
Over Votes	0	0.0	State Rep. Dist. 7	100.0/100.0 8/8/8	
			(D) Andrews, Mark J.	4,716	67.6
			(R) Langa, Sanford J.	1,418	20.3
			Blank Votes	833	11.9
			Over Votes	6	0.0

State Rep. Dist. 8			State Rep. Dist. 12		
		100.0/100.0 6/6/6			100.0/100.0 5/5/5
(D) Honda, Herbert J.	5,198	72.7	(D) Menor, Ron	4,703	72.8
Blank Votes	1,950	27.2	(R) Kekuna, Helen L.	1,441	22.3
Over Votes	0	0.0	Blank Votes	310	4.8
State Rep. Dist. 9	100.0/100.0 8/8/8		Over Votes	1	0.0
(D) Souki, Joseph M.	3,620	53.4	State Rep. Dist. 13	100.0/100.0	
(R) Sailer, Marsha L.	2,174	32.0			4/4/4
Blank Votes	981	14.4	(D) Bunda, Robert	5,322	82.7
Over Votes	4	0.0	Blank Votes	1,110	17.2
State Rep. Dist. 10	100.0/100.0 9/9/9		Over Votes	0	0.0
(R) Pfeil, Bill	3,228	51.7	State Rep. Dist. 14	100.0/100.0	
(D) Shito, Georgina K.	2,215	35.5			4/4/4
Blank Votes	779	12.4	(D) Leong, Joe	4,148	76.5
Over Votes	11	0.1	Blank Votes	1,268	23.4
State Rep. Dist. 11	100.0/100.0 6/6/6		Over Votes	0	0.0
(D) Kihano, Daniel J.	3,212	48.6	State Rep. Dist. 15	100.0/100.0	
(R) Sullivan, William R.	2,935	44.4			4/4/4
Blank Votes	457	6.9	(D) Nakata, Bob	3,757	52.9
Over Votes	3	0.0	(R) Aiolupotea, Deborah	3,015	42.4
			Blank Votes	322	4.5
			Over Votes	1	0.0

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

State Rep. Dist. 16			State Rep. Dist. 20		
	100.0/100.0 4/4/4			100.0/100.0 5/5/5	
(D) Tom, Terrance W. H.	4,017	61.6	(R) Cavasso, Cam	3,340	48.2
(R) Clingan, Nancy H.	2,249	34.5	(D) Wong, Norma	3,319	47.9
Blank Votes	247	3.7	Blank Votes	256	3.6
Over Votes	1	0.0	Over Votes	4	0.0
State Rep. Dist. 17			State Rep. Dist. 21		
	100.0/100.0 4/4/4			100.0/100.0 4/4/4	
(D) Ige, Marshall K.	6,065	76.5	(R) Ikeda, Donna R.	6,033	77.6
Blank Votes	1,859	23.4	Blank Votes	1,738	22.3
Over Votes	0	0.0	Over Votes	0	0.0
State Rep. Dist. 18			State Rep. Dist. 22		
	100.0/100.0 5/5/5			100.0/100.0 5/5/5	
(R) Anderson, Whitney T.	5,774	77.3	(R) Jones, Hal	4,934	55.0
Blank Votes	1,689	22.6	(D) Vasconcellos, Kumu B.	3,747	41.4
Over Votes	0	0.0	Blank Votes	316	3.4
State Rep. Dist. 19			Over Votes	1	0.0
	100.0/100.0 5/5/5		State Rep. Dist. 23		
(R) Medeiros, John J.	5,538	73.1		100.0/100.0 6/6/6	
(D) Kawabata, Keith S.	1,564	20.6	(R) Marumoto, Barbara C.	5,570	57.4
Blank Votes	463	6.1	(D) Imanaka, Mitchell	3,716	38.3
Over Votes	1	0.0	Blank Votes	403	4.1
			Over Votes	1	0.0

State Rep. Dist. 24			State Rep. Dist. 29		
	100.0/100.0 5/5/5			100.0/100.0 5/5/5	
(R) Hemmings, Fred, Jr.	5,282	59.9	(D) Hagino, Dave	4,305	73.9
(D) Ching, Haunani G.	2,893	32.8	Blank Votes	1,513	26.0
Blank Votes	629	7.1	Over Votes	0	0.0
Over Votes	2	0.0	State Rep. Dist. 30		
State Rep. Dist. 25				100.0/100.0 5/5/5	
	100.0/100.0 5/5/5		(R) Kamali'i, Kina'u B.	3,810	50.2
(D) Say, Calvin K. Y.	6,627	83.9	(D) Hayes, Joan	3,213	42.3
Blank Votes	1,233	16.0	Blank Votes	554	7.3
Over Votes	0	0.0	Over Votes	3	0.0
State Rep. Dist. 26			State Rep. Dist. 31		
	100.0/100.0 5/5/5			100.0/100.0 4/4/4	
(D) Kiyabu, Ken	5,639	76.9	(D) Blair, Russell	4,390	59.5
Blank Votes	1,685	23.0	(R) Fasi, David Francis	2,622	35.5
Over Votes	0	0.0	Blank Votes	356	4.8
State Rep. Dist. 27			Over Votes	5	0.0
	100.0/100.0 5/5/5		State Rep. Dist. 32		
(D) Taniguchi, Brian I.	6,686	75.0		100.0/100.0 5/5/5	
Blank Votes	2,224	24.9	(D) Hirono, Mazie	3,994	66.0
Over Votes	0	0.0	(R) Winters, William K.	1,458	24.1
State Rep. Dist. 28			Blank Votes	593	9.8
	100.0/100.0 4/4/4		Over Votes	1	0.0
(D) Shon, Jim	2,553	47.0			
(R) Dang, Marvin S. C.	2,476	45.6			
Blank Votes	398	7.3			
Over Votes	1	0.0			

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

State Rep. Dist. 33			State Rep. Dist. 37		
	100.0/100.0	6/6/6		100.0/100.0	3/3/3
(D) Tam, Rod	5,287	64.2	(D) Nakasato, Dennis M.	3,124	57.7
(R) Sutton, Richard Ike	2,539	30.8	(R) Guillermo, Vic D.	1,994	36.8
Blank Votes	397	4.8	Blank Votes	269	4.9
Over Votes	5	0.0	Over Votes	18	0.3
State Rep. Dist. 34			State Rep. Dist. 38		
	100.0/100.0	4/4/4		100.0/100.0	4/4/4
(R) Liu, Michael Minoru	3,459	52.1	(D) Graulty, Rey	3,279	67.6
(D) Baker, Byron W.	2,727	41.0	Blank Votes	1,571	32.3
Blank Votes	439	6.6	Over Votes	0	0.0
Over Votes	13	0.1	State Rep. Dist. 39		
State Rep. Dist. 35				100.0/100.0	5/5/5
	100.0/100.0	5/5/5	(D) Cachola, Romy	3,051	54.5
(D) Onouye, Galen K.	2,969	45.5	(R) Verzón, Johnny I.M.	2,031	36.2
(D) Mednick, Leonard I.	2,803	42.9	Blank Votes	504	9.0
Blank Votes	748	11.4	Over Votes	10	0.1
Over Votes	1	0.0	State Rep. Dist. 40		
State Rep. Dist. 36				100.0/100.0	4/4/4
	100.0/100.0	3/3/3	(D) Kim, Donna Mercado	5,803	81.8
(D) Yoshimura, Dwight L.	3,050	55.5	Blank Votes	1,284	18.1
(D) Goze, Mauro T.	1,704	31.0	Over Votes	0	0.0
Blank Votes	733	13.3			
Over Votes	2	0.0			

State Rep. Dist. 41		100.0/100.0 4/4/4	State Rep. Dist. 45		100.0/100.0 5/5/5
(D) Okamura, Tom	4,667	69.5	(D) Shito, Mitsuo	3,551	57.5
(R) Jones, James K.	1,736	25.8	(R) Sales, Manny S., Sr.	2,196	35.6
Blank Votes	309	4.6	Blank Votes	406	6.5
Over Votes	1	0.0	Over Votes	15	0.2
State Rep. Dist. 42		100.0/100.0 4/4/4	State Rep. Dist. 46		100.0/100.0 3/3/3
(D) Hashimoto, Clarice Y.	4,225	67.9	(D) Oshiro, Paul T.	3,904	84.4
(R) Morris, Annette P.	1,528	24.5	Blank Votes	719	15.5
Blank Votes	468	7.5	Over Votes	0	0.0
Over Votes	0	0.0	State Rep. Dist. 47		100.0/100.0 5/5/5
State Rep. Dist. 43		100.0/100.0 3/3/3	(D) Crozier, Mike	2,858	69.7
(D) Morgado, Arnold, Jr.	5,210	76.3	Blank Votes	1,237	30.2
Blank Votes	1,618	23.6	Over Votes	0	0.0
Over Votes	0	0.0	State Rep. Dist. 48		100.0/100.0 3/3/3
State Rep. Dist. 44		100.0/100.0 4/4/4	(D) Peters, Henry H.	4,103	77.8
(D) Tungpalan, Eloise Y.	4,466	70.8	Blank Votes	1,169	22.1
(R) Casupang, Claudio T.	1,488	23.6	Over Votes	0	0.0
Blank Votes	344	5.4	State Rep. Dist. 49		100.0/100.0 6/6/6
Over Votes	6	0.0	(D) Apo, Peter K.	3,510	68.4
			Blank Votes	1,620	31.5
			Over Votes	0	0.0

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

State Rep. Dist. 50		Hawaii Mayor	
	100.0/100.0 6/6/6		100.0/100.0 50/50/50
(D) Lardizabal, Alfred C.	6,230	(D) Carpenter, Dante K.	31,084
(R) Bringham, Timothy	875	(R) Geiger, Paul W.	7,177
Blank Votes	1,555	Blank Votes	3,120
Over Votes	2	Over Votes	15
State Rep. Dist. 51		Hawaii Counc NDR (3)	
	100.0/100.0 8/8/8		100.0/100.0 50/50/50
(D) Kawakami, Richard A.	5,940	(D) Jitchaku, Lorraine R.	27,314
Blank Votes	2,592	(D) De Luz, Frank, III	21,710
Over Votes	0	(D) Yamashiro, Stephen K.	20,558
Honolulu Mayor		(R) Akana, Bernard K.	15,133
	100.0/100.0 171/171/171	(R) Debus, Joseph O., Sr.	8,041
(R) Fasi, Frank E.	132,875	Blank Votes	2,863
(D) Anderson, Eileen R.	117,841	Over Votes	31
(L) Harris, Blase	3,137	Hawaii Counc NS KONA	
Blank Votes	4,820		100.0/100.0 50/50/50
Over Votes	138	(R) Herkes, Robert	18,743
Honolulu Prosecutor		(D) Basque, David	15,468
	100.0/100.0 171/171/171	Blank Votes	7,185
(R) Marsland, Charles F.	181,184	Over Votes	0
(D) Moon, Erick T.S.	65,868		0
Blank Votes	11,712		0
Over Votes	47		0.0

Hawaii Counc Hamakua		Maui Counc West	
	100.0/100.0 50/50/50		100.0/100.0 35/35/35
(D) Domingo, Takashi	24,515	(D) Kihune, Howard S.	14,528
(R) Dedell, Richard C.	9,045	(R) Dela Cruz, Ronald M.	8,168
Blank Votes	7,830	Blank Votes	6,849
Over Votes	6	Over Votes	16
Maui Counc NDR (2)		Maui Counc Lanai	
	100.0/100.0 35/35/35		100.0/100.0 35/35/35
(D) Nakasone, Bob	16,874	(D) Hokama, Goro	12,882
(D) Aiona, Abe	16,116	(R) Oliva, Henry	10,641
(R) Soto, Robert	7,590	Blank Votes	6,017
(R) Sydney, Susanne	4,391	Over Votes	21
Blank Votes	2,993	Kauai Mayor	
Over Votes	45		100.0/100.0 18/18/18
Maui Counc Central (3)		(D) Kunimura, Tony T.	10,241
	100.0/100.0 35/35/35	(R) Sarita, Eddie Larez	8,118
(D) Santos, Velma M.	15,253	Blank Votes	1,030
(D) Nishiki, Wayne K.	14,914	Over Votes	6
(D) Liu, Elizabeth Lee	13,182	Kauai Counc (7)	
(R) Ramil, Tony	11,493		100.0/100.0 18/18/18
(R) Halford, Ernest	7,848	(D) Yukimura, Joann Ai	13,062
Blank Votes	2,520	(D) Asing, Bill	12,216
Over Votes	36	(D) Akita, Norman	11,645
		(D) Correa, Maxine	11,491
		(D) Barretto, John F., Jr.	10,277

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

Kauai Counc (cont)	(7)	100.0/100.0			
(D) Fukushima, Jesse	10,097	52.0	Migan, Mary Anne	25,521	9.8
(D) Kouchi, Ronald	9,484	48.8	Johnson, Walter C.	25,484	9.8
(R) Kaliher, Riley Kevin	4,107	21.1	Cooper, Brooks D., Jr.	24,146	9.3
Blank Votes	642	3.3	Ledward, Masako Horiuchi	23,622	9.1
Over Votes	30	0.1	Alameida, Roy Kakulu	22,602	8.7
1st SB Dist—NDR	(6)	100.0/100.0	Ichihashi, Richard	22,581	8.7
		171/171/171	Kam, Thomas K.Y.	22,082	8.5
Aiona, Darrow L.K.	82,627	32.0	Kleppin, Carol	18,657	7.2
Apo, Margaret K.	78,096	30.2	Cox, Anton E.	14,996	5.8
Yoshida, Randal S.	65,812	25.5	Tharp, James W.	11,121	4.3
Norwood, Chuck	58,876	22.8	Viglielmo, Frances	11,019	4.2
Kawahara, Hatsuko F.	55,696	21.5	Olayan, Gilbert A.	9,490	3.6
Sakima, Akira	53,032	20.5	Mon, Victor C.	9,381	3.6
Ho, Peter H.P.	45,024	17.4	Jacosalem, Brice Kahoano	9,105	3.5
Arakaki, David I.	37,549	14.5	Chiwa, Saburo	8,779	3.4
Woods, Bill	36,868	14.2	Shorba, Joe	6,224	2.4
Malina-Wright, Verleann	33,660	13.0	Blank Votes	39,811	15.4
Aona Blaisdell, Pearlene	32,470	12.5	Over Votes	1,782	0.6
Anzai, Earl I.	31,818	12.3	1st SB Dist—3rd Dist.	100.0/100.0	
Carter, George B.	30,882	11.9		171/171/171	
Mina, Ted Subia	30,220	11.7	Matsuda, Mike	54,479	21.1
Gilbert, Patrick J.	28,607	11.0	Wong, Tommy	37,102	14.3
McMillen, Francis	26,941	10.4	Cooper, Terry	23,392	9.0
Quinn, Dennis Michael	25,7934	9.9	Greenwell, Blaine G.	19,010	7.3
			Storch, Larry	16,609	6.4

1st SB Dist—3rd Dist. (cont.)	100.0/100.0		2nd SB Dist—1st Dist.	100.0/100.0	
Lott, Edson S.	11,616	4.5		104/104/104	
Rominger, Bart	4,035	1.5	Waters, William A. K.	31,270	34.6
Blank Votes	96,786	23.6	Simpson, Martha	16,238	18.0
Over Votes	4,911	1.9	Miles, Ellen May	13,691	15.1
1st SB Dist—4th Dist.	100.0/100.0		Blank Votes	28,806	31.9
	171/171/171		Over Votes	169	0.1
Araki, Mako	81,053	81.4	2nd SB Dist—2nd Dist.	100.0/100.0	
Wagatsuma, Patricia Lee	75,883	29.4		104/104/104	
Blank Votes	100,869	39.1	Ueoka, Neyer M.	35,950	39.7
Over Votes	135	0.0	Romanchak, Viv M.	15,482	17.1
1st SB Dist—5th Dist.	100.0/100.0		Bertomen, Jose	12,108	17.4
	171/171/171		Blank Votes	26,556	28.4
Nakano, Ronald B. Y.	64,907	25.1	Over Votes	175	0.1
De Mattos, Joe	52,749	30.4	OHA at large	100.0/100.0	
Fujii, Gary M.	45,703	17.7		275/275/275	
Blank Votes	94,265	36.5	Kaulukukui, Thomas	10,516	24.4
Over Votes	316	0.1	Akana, Keith Kalani	4,784	11.1
1st SB Dist—6th Dist.	100.0/100.0		Benham, Roy L.	3,653	8.9
	171/171/171		Hookano, Geo	3,277	7.6
Penebacker, John B.	110,681	42.9	Agard, Louis	3,088	7.1
Dickerson, Jan Albrizze	52,392	20.3	Shim, Marion Healani H.	2,862	6.6
Shrum, John L.	14,710	5.7	Cazimero, Tanny Makanani	2,262	5.2
Blank Votes	79,932	30.8	Kinney, Richard Pomaikai	2,237	5.1
Over Votes	225	0.0	Kekipi, Velma P.	1,823	4.2

GENERAL ELECTION—STATE OF HAWAII—STATEWIDE—NOVEMBER 6, 1984

OHA at large (cont.)	100.0/100.0	OHA Res Molokai	100.0/100.0
Kakaula, William Kelii	1,478	Hao, Louis	15,288
Lii, Samuel	882	Forbes, Yola Noelani M.	11,088
Tiki, Varqa	783	Kamakea, Radine Kawahine	7,065
Seto, Ainsley Ulu	703	Iaea, Jack Noble, Jr.	2,672
Mia, George Hoolu	197	Lasco, Raymond K.	1,440
Blank Votes	2,253	Blank Votes	5,296
Over Votes	2,055	Over Votes	215
OHA Res Hawaii	100.0/100.0		0.4
	275/275/275		

[Material Deleted]

Akaka, Moanikeala	15,488	35.9
Desha, Piilani C.	14,618	33.9
Kinney, Everett Sonny	5,508	12.7
Coakley, Jeffrey Kalani	3,291	7.6
Blank Votes	4,077	9.4
Over Votes	82	0.1
OHA Res Kauai	100.0/100.0	
	275/275/275	
Keale, Moses K.	30,469	70.7
Zablan, Liiwela Naukana	7,344	17.0
Blank Votes	5,238	12.1
Over Votes	13	0.0

Results of Votes Cast General Election and Special Elections For Board of Education Board of Trustees Office of Hawaiian Affairs Tuesday, November 4, 1986 State of Hawaii

Prepared by
Office of the Lieutenant Governor
Lieutenant Governor Benjamin J. Cayetano

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

U.S. Senator	99.3/100.0 284/286/286	Blank Votes Over Votes	9,267 1,001	2.6 0.2
(D) Inouye, Daniel K.	241,872	70.2	100./100.0	
(R) Hutchinson, Frank	86,896	25.2	25/25/25	
Blank Votes	15,472	4.4		
Over Votes	147	0.0		
Rep. to Congress CD 1	99.1/100.0 118/119/119			
(R) Saiki, Patricia	99,673	57.7	7,396	52.9
(D) Hannemann, Mufi	63,057	36.5	5,794	41.4
(L) Harris, Blase	5,633	3.2	783	5.6
Blank Votes	4,210	2.4	5	0.0
Over Votes	91	0.0		
Rep. to Congress CD 2	99.4/100.0 166/167/167			
(D) Akaka, Daniel K.	123,821	72.1	6,982	50.9
(R) Hustace, Maria M.	35,365	20.5	6,038	44.0
(L) Schoolland, Ken	3,618	2.1	676	4.9
Blank Votes	8,756	5.0	13	0.0
Over Votes	163	0.0		
Governor/Lt. Governor	100.0/100.0 284/284/284			
(D) Waihee/Cayetano	173,655	50.4	100.0/100.0	
(R) Anderson/Felix	160,460	46.5	10/10/10	
			12,444	78.3
			2,351	14.7
			1,090	6.8
			5	0.0
			100.0/100.0	
			12/12/12	
			6,203	52.7
			4,510	38.3

State Sen. Dist. 7 (Cont.)	Blank Votes	1,049	8.9	100.0/100.0
	Over Votes	6	0.0	7/7/7
State Sen. Dist. 8		100.0/100.0	7,973	78.1
		8/8/8	2,235	21.8
(D) Toguchi, Charles T.	8,996	67.1	0	0.0
(R) Walker, Gary O.	3,690	27.5	100.0/100.0	
Blank Votes	712	5.3	9/9/9	
Over Votes	5	0.0	10,341	77.4
State Sen. Dist. 13		100.0/100.0	3,007	22.5
		10/10/10	0	0.0
(D) Kobayashi, Bert	7,501	48.5	100.0/100.0	
(R) Yee, Randall M. L.	6,747	43.6	9/9/9	
Blank Votes	1,208	7.8	7,068	65.8
Over Votes	2	0.0	2,682	24.9
State Sen. Dist. 16		100.0/100.0	977	9.1
		10/10/10	2	0.0
(D) Blair, Russell	9,046	67.6	100.0/100.0	
Blank Votes	4,329	32.3	14/14/14	
Over Votes	0	0.0	12,559	73.0
State Sen. Dist. 17		100.0/100.0	4,635	26.9
		10/10/10	0	0.0
(D) Chang, Anthony K. U.	7,493	52.2	100.0/100.0	
(R) Lilly, Michael	5,803	40.5	11/11/11	
Blank Votes	1,032	7.2	6,485	81.3
Over Votes	0	0.0	1,487	18.6
			0	0.0

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

State Rep. Dist. 2	100.0/100.0 6/6/6	State Rep. Dist. 6	100.0/100.0 11/11/11
(D) Tajiri, Harvey S.	5,436 70.1	(R) O'Kieffe, Mike	4,196 54.3
(R) Tavares, Larry L. T.	1,404 18.1	(D) Schutte, Sandy P.	3,184 41.2
Blank Votes	907 11.7	Blank Votes	340 4.4
Over Votes	2 0.0	Over Votes	4 0.0
State Rep. Dist. 3	100.0/100.0 7/7/7	State Rep. Dist. 7	100.0/100.0 8/8/8
(D) Metcalf, Wayne	4,893 74.1	(D) Andrews, Mark J.	5,115 69.8
(R) Vannatta, Sharon D.	1,085 16.4	Blank Votes	2,206 30.1
Blank Votes	616 9.3	Over Votes	0 0.0
Over Votes	2 0.0	State Rep. Dist. 8	100.0/100.0 6/6/6
State Rep. Dist. 4	100.0/100.0 14/14/14	(D) Honda, Herbert J.	5,269 70.1
(D) Takamine, Dwight Y.	3,522 56.3	Blank Votes	2,238 29.8
(R) Lundborg, Richard	2,520 40.2	Over Votes	0 0.0
Blank Votes	209 3.3	State Rep. Dist. 9	100.0/100.0 8/8/8
Over Votes	3 0.0	(D) Souki, Joseph M.	4,898 67.4
State Rep. Dist. 5	100.0/100.0 8/8/8	Blank Votes	2,360 32.5
(R) Isbell, Virginia	5,137 77.3	Over Votes	0 0.0
Blank Votes	1,505 22.6		
Over Votes	0 0.0		

State Rep. Dist. 10	100.0/100.0 9/9/9	State Rep. Dist. 14	100.0/100.0 5/5/5
(R) Pfeil, Bill	3,049 47.3	(D) Leong, Joe	3,647 70.6
(D) Baker, Rosalyn	3,043 47.2	(R) Izuka, Ichiro	999 19.3
Blank Votes	352 5.4	Blank Votes	518 10.0
Over Votes	2 0.0	Over Votes	1 0.0
State Rep. Dist. 11	100.0/100.0 6/6/6	State Rep. Dist. 15	100.0/100.0 4/4/4
(D) Kihano, Daniel J.	3,780 49.3	(D) Bellinger, Reb	4,044 57.9
(R) Sullivan, William R.	3,326 43.4	(R) Aiolutepoa, Debbie S.	2,503 35.8
Blank Votes	551 7.1	Blank Votes	436 6.2
Over Votes	4 0.0	Over Votes	0 0.0
State Rep. Dist. 12	100.0/100.0 5/5/5	State Rep. Dist. 16	100.0/100.0 4/4/4
(D) Lec, Samuel S. H.	3,164 51.6	(D) Wong, Jimmy	4,055 63.1
(R) Rolf, David H.	2,718 44.3	(R) Decker, Walter C.	2,074 32.3
Blank Votes	247 4.0	Blank Votes	288 4.4
Over Votes	1 0.0	Over Votes	3 0.0
State Rep. Dist. 13	100.0/100.0 5/5/5	State Rep. Dist. 17	100.0/100.0 4/4/4
(D) Bunda, Robert	5,134 81.3	(D) Ige, Marshall K.	5,980 76.6
Blank Votes	1,174 18.6	Blank Votes	1,824 23.3
Over Votes	0 0.0	Over Votes	0 0.0

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

State Rep. Dist. 18		100.0/100.0	6/6/6	State Rep. Dist. 22		100.0/100.0	5/5/5
(R)	Anderson, Whitney T.	5,435	76.6	(R)	Jones, Hal	5,604	64.8
	Blank Votes	1,659	23.3	(D)	Benham, Roy L.	2,771	32.0
	Over Votes	0	0.0		Blank Votes	263	3.0
State Rep. Dist. 19		100.0/100.0			Over Votes	1	0.0
(R)	Medeiros, John J.	5,682	80.6	State Rep. Dist. 23		100.0/100.0	7/7/7
	Blank Votes	1,366	19.3	(R)	Marumoto, Barbara C.	7,481	80.4
	Over Votes	0	0.0	(D)	Robertson, Phil	1,320	14.1
State Rep. Dist. 20		100.0/100.0			Blank Votes	496	5.3
(R)	Cavasso, Cam	3,428	50.5		Over Votes	2	0.0
(D)	Wong, Norma	3,226	47.5	State Rep. Dist. 24		100.0/100.0	5/5/5
	Blank Votes	122	1.7	(R)	Hemmings, Fred	5,435	66.0
	Over Votes	5	0.0	(D)	Fischlowitz, Barbara	2,186	26.5
State Rep. Dist. 21		100.0/100.0	4/4/4		Blank Votes	603	7.3
(R)	Ikedda, Donna R.	6,297	81.1		Over Votes	3	0.0
	Blank Votes	1,463	18.8	State Rep. Dist. 25		100.0/100.0	5/5/5
	Over Votes	0	0.0	(D)	Say, Calvin K. Y.	6,340	84.8
					Blank Votes	1,136	15.1
					Over Votes	0	0.0

State Rep. Dist. 26		100.0/100.0	5/5/5	State Rep. Dist. 30		100.0/100.0	5/5/5
(D)	Kiyabu, Ken	5,309	73.4	(D)	Hayes, Joan	3,267	47.2
(R)	Boyd, Stewart K.	1,380	19.0	(R)	Kamali'i, Kina'u B.	3,199	46.3
	Blank Votes	540	7.4		Blank Votes	440	6.3
	Over Votes	2	0.0		Over Votes	1	0.0
State Rep. Dist. 27		100.0/100.0		State Rep. Dist. 31		100.0/100.0	4/4/4
(D)	Taniguchi, Brian T.	5,564	64.6	(D)	Fukunaga, Carol	3,997	57.0
(R)	Mist, Robby	2,676	31.0	(R)	Fasi, David	2,589	36.9
	Blank Votes	368	4.2		Blank Votes	415	5.9
	Over Votes	0	0.0		Over Votes	0	0.0
State Rep. Dist. 28		100.0/100.0		State Rep. Dist. 32		100.0/100.0	5/5/5
(D)	Shon, Jim	2,501	49.3	(D)	Hirono, Mazie	4,006	68.9
(R)	Au, Mark B.	2,346	46.2	(R)	Beeman, Fred T.	1,152	19.8
	Blank Votes	221	4.3		Blank Votes	647	11.1
	Over Votes	1	0.0		Over Votes	1	0.0
State Rep. Dist. 29		100.0/100.0	5/5/5	State Rep. Dist. 33		100.0/100.0	6/6/6
(D)	Hagino, Dave	4,157	74.5	(D)	Tam, Rod	6,025	75.0
	Blank Votes	1,416	25.4	(R)	Kaneda, Ford K.	1,443	17.9
	Over Votes	0	0.0		Blank Votes	561	6.9
					Over Votes	2	0.0

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

State Rep. Dist. 34	100.0/100.0 4/4/4	State Rep. Dist. 38	100.0/100.0 4/4/4
(R) Liu, Mike	3,749 59.5	(D) Alcon, Emilio S.	2,771 56.8
(D) Akamine, Ken	1,980 31.4	(R) Espero, Willie C.	1,435 29.4
Blank Votes	565 8.9	Blank Votes	667 13.6
Over Votes	3 0.0	Over Votes	4 0.0
State Rep. Dist. 35	100.0/100.0 5/5/5	State Rep. Dist. 39	100.0/100.0 5/5/5
(D) Hiraki, Kenneth	3,501 54.8	(D) Cachola, Romy M.	3,465 64.3
(R) Malloy, Raymond J.	2,311 36.1	(R) Rojo, Herman	1,487 27.6
Blank Votes	571 8.9	Blank Votes	426 7.9
Over Votes	1 0.0	Over Votes	7 0.1
State Rep. Dist. 36	100.0/100.0 4/4/4	State Rep. Dist. 40	100.0/100.0 4/4/4
(D) Yoshimura, Dwight L.	3,197 59.2	(D) Horita, Karen K.	5,051 70.5
(R) Goze, Mauro T.	1,705 31.6	(R) Dement, Nathan C.	1,734 24.2
Blank Votes	485 8.9	Blank Votes	375 5.2
Over Votes	5 0.0	Over Votes	0 0.0
State Rep. Dist. 37	100.0/100.0 3/3/3	State Rep. Dist. 41	100.0/100.0 4/4/4
(D) Arakaki, Dennis A.	3,377 63.3	(D) Okamura, Tom	5,328 77.4
(R) Europa, Mel E.	1,393 26.1	(R) Valin, Manny	1,006 14.6
Blank Votes	561 10.5	Blank Votes	541 7.8
Over Votes	0 0.0	Over Votes	0 0.0

State Rep. Dist. 42	100.0/100.0 5/5/5	State Rep. Dist. 46	100.0/100.0 3/3/3
(D) Hashimoto, Clarice Y.	4,081 69.9	(D) Oshiro, Paul T.	3,407 78.3
(R) Morris, Annette P.	1,217 20.8	(R) Casupang, Claudio T.	779 17.9
Blank Votes	540 9.2	Blank Votes	155 3.5
Over Votes	0 0.0	Over Votes	6 0.1
State Rep. Dist. 43	100.0/100.0 3/3/3	State Rep. Dist. 47	100.0/100.0 5/5/5
(D) Ige, David Y.	5,845 80.1	(D) Crozier, Mike	2,873 72.1
Blank Votes	1,444 19.8	(R) Liu, Robin D.	811 20.3
Over Votes	0 0.0	Blank Votes	296 7.4
State Rep. Dist. 44	100.0/100.0 4/4/4	Over Votes	1 0.0
(D) Tungpalan, Eloise Y.	5,246 83.0	State Rep. Dist. 48	100.0/100.0 3/3/3
Blank Votes	1,070 16.9	(D) Peters, Henry H.	3,865 69.9
Over Votes	0 0.0	(R) Horning, Rory	1,302 23.5
State Rep. Dist. 45	100.0/100.0 5/5/5	Blank Votes	353 6.3
(D) Shito, Mitsuo	4,295 66.0	Over Votes	3 0.0
(R) Agpaoa, Venus A.	1,623 24.9	State Rep. Dist. 49	100.0/100.0 6/6/6
Blank Votes	575 8.8	(D) Apo, Peter K.	3,772 72.4
Over Votes	5 0.0	Blank Votes	1,434 27.5
		Over Votes	0 0.0

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

State Rep. Dist. 50	100.0/100.0 6/6/6	Council Distr. I	100.0/100.0 23/23/23
(D) Lardizabal, Alfred C.	6,118	(D) Iwase, Randall Y.	16,346
Blank Votes	2,536	(R) Matsumoto, Toraki	10,002
Over Votes	0	Blank Votes	1,669
State Rep. Dist. 51	100.0/100.0	Over Votes	11
	8/8/8	Council Distr. II	100.0/100.0
(D) Kawakami, Richard A.	6,174		20/20/20
Blank Votes	2,366	(R) Kahanu, David W.	16,538
Over Votes	0	(D) Mattoon, Creighton U.	11,934
Maui Mayor	100.0/100.0	Blank Votes	1,939
	36/36/36	Over Votes	12
(R) Tavares, Hannibal	15,921	Council Distr. III	100.0/100.0
(D) Miura, Marvin	13,772		21/21/21
Blank Votes	1,304	(D) O'Connor, Dennis	23,066
Over Votes	19	(R) Ribellia, Patrick A.	10,649
Kauai Mayor	100.0/100.0	Blank Votes	1,633
	18/18/18	Over Votes	4
(D) Kunimura, Tony T.	10,025	Council Distr. IV	100.0/100.0
(R) Barretto, John F., Jr.	8,352		22/22/22
Blank Votes	1,059	(D) Doo, Leigh-Wai	21,936
Over Votes	12	(R) Makini, George K.	6,578
		Blank Votes	2,269
		Over Votes	5

Council Distr. V	100.0/100.0 23/23/23	Maui Counc. Large	(2)	100.0/100.0 36/36/36
(D) Bornhorst, Marilyn	19,439	(D) Nakasone, Bob		16,040
(R) Han, Harold K.	8,252	(R) Lingle, Linda		16,028
Blank Votes	1,796	(D) Aiona, Abe		13,110
Over Votes	10	(R) Viveiros, Sam		4,903
Council Distr. VI	100.0/100.0	Blank Votes		1,820
	19/19/19	Over Votes		148
(D) Gill, Gary	13,555	Maui Counc. Cntrl.	(3)	100.0/100.0
(R) Narvaes, Tony	13,203			36/36/36
Blank Votes	1,618	(D) Nishiki, Wayne K.		17,210
Over Votes	16	(D) Santos, Velma M.		17,126
Council Distr. VII	100.0/100.0	(D) Tanaka, Joe S.		16,848
	17/17/17	(R) Meyer, Marco M.		12,302
(D) Kim, Donna M.	14,471	Blank Votes		2,230
(R) Pacarro, Rudy	6,743	Over Votes		7
Blank Votes	1,399	Maui Council East		100.0/100.0
Over Votes	22			36/36/36
Council Distr. IX	100.0/100.0	(R) Morrow, Tom		13,181
	15/15/15	(D) Ota, Charles S.		13,045
(D) DeSoto, John	12,471	Blank Votes		4,780
(R) Deocampo, Danny	6,389	Over Votes		10
Blank Votes	1,649			0.0
Over Votes	23			0.0

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

Maui Council Molokai		100.0/100.0	
		36/36/36	
(D)	Kawano, Patrick S.	16,809	54.1
(R)	Peabody, George G.	6,912	22.2
	Blank Votes	7,289	23.5
	Over Votes	6	0.0
Maui Council Lanai		100.0/100.0	
		36/36/36	
(D)	Hokama, Goro	14,948	48.1
(R)	Oliva, Henry	9,915	31.9
	Blank Votes	6,143	19.8
	Over Votes	10	0.0
Kauai Council		100.0/100.0	
		(7)	18/18/18
(D)	Yukimura, Joann A.	13,455	69.1
(D)	Asing, Bill	12,423	63.8
(D)	Correa, Maxine	9,997	51.4
(D)	Fukushima, Jesse	9,416	48.4
(D)	Kouchi, Ronald	8,421	43.3
(D)	Munechika, Maurice A.	8,374	43.0
(D)	Tehada, Jimmy	8,210	42.2
(R)	Medeiros, Abel	7,428	38.1
(R)	Childs, Patrick J.	5,122	26.3
(R)	Pa, Chauncey W. K.	4,838	24.8
(R) Zablan, Llewella N.			
(R) Kekahu, John, III			
(R) McElgunn-Duarte, G.			
(R) Houston, John C.			
Blank Votes			
Over Votes			
2nd SB Dist.-2nd Dist.			
		100.0/100.0	
		106/106/106	
Ueoka, Meyer M.		43,251	47.7
Arbor, Kelly		28,692	31.6
Blank Votes		18,606	20.5
Over Votes		87	0.0
1st SB Dist.-4th Dist.		10.0/100.0	
		178/178/178	
McMillen, Francis		102,514	40.5
Amand, Reef		60,558	23.9
Blank Votes		89,467	35.3
Over Votes		549	0.2
1st SB Dist.-6th Dist.		100.0/100.0	
		178/178/178	
Penebacker, John R.		136,799	54.0
Knapp, Paul		46,133	18.2
Blank Votes		69,804	27.5
Over Votes		352	0.1

1st SB Dist.—NDR	(3)	100.0/100.0 178/178/178
Norwood, Chuck	80,141	31.6
Kawahara, Hatsuko F.	53,797	21.2
Araki, Mako	49,464	19.5
Funakoshi, Elayne	42,266	16.7
Leilani, Frances	37,848	14.9
Ho, Peter H. P.	29,416	11.6
Masui, Stanford H.	22,506	8.8
Sutton, Warner K.	21,745	8.5
Brewer, Jim	20,540	8.1
Matsumoto, Mitchell	20,062	7.9
Hughes, James	19,954	7.8
Sato, Ron	19,617	7.7
Chong, Howard K.O., Jr.	18,093	7.1
Woods, William E.	16,877	6.6
Domingo, P. C.	16,625	6.5
Dillinger, Paul	12,835	5.0
Meller, Christina	12,189	4.8
Kam, Thomas K. Y.	12,101	4.7
*Uwaine, Clifford T.	10,770	4.2
Arre, Toy	10,458	4.1
Loo, Andrew	10,154	4.0
Inn, Evalyn K. S.	9,279	3.6
Magaldi, Joe	8,605	3.4
Winters, William K.	8,402	3.3
Mon, Victor	7,087	2.8

	(3)	100.0/100.0 284/284/284
Youngquist, Arvid T.	5,538	2.1
Southard, Ronald W.	3,537	1.3
Shorba, Joe	2,868	1.1
Blank Votes	30,359	11.9
Over Votes	3,411	1.3
OHA at Large	(3)	100.0/100.0 284/284/284
DeSoto, A. Frenchy	14,118	29.7
Burgess, Rod K.	14,026	29.5
Mahoe, Kevin M. K.	12,608	26.5
Ritte, Walter, Jr.	11,859	25.0
Kealoha, Gard	10,537	22.2
Dela Cruz, Linda K.	6,176	13.0
Chun, Kaliko B.	5,297	11.1
Kekipi, Velma P.	5,105	10.7
Kinney, Richard P.	4,301	9.0
Kapana, Abraham	4,091	8.6
*Holt, Robin	3,802	8.0
Clark, Melvin K.	3,466	7.3
Mokiao, Myrtle M.	3,463	7.3
Kanui-Gill, Rita K.	3,085	6.5
Kepoo, Arthur	3,066	6.4
Higa, Odetta M.	2,888	6.0
Studebaker, Viola K.	2,436	5.1
Fuller, Robert	2,381	5.0
De Ocampo, Mary K.	2,314	4.8
Reis, Herman	2,004	4.2

GENERAL ELECTION—STATE OF HAWAII—NOVEMBER 4, 1986

OHA at Large (Cont.)			
Prejean, Kawaipuna	1,710	3.6	
Rowland, James P., Jr.	1,683	3.5	
Kipilii, Franklin	1,022	2.1	
Blank Votes	2,366	4.9	
Over Votes	346	0.7	
OHA Res. Maui	100.0/100.0		
	284/284/284		
Kahaialii, Manu	19,124	40.3	
Teruya, Christine K.	9,059	19.1	
Blank Votes	19,227	40.5	
Over Votes	10	0.0	
OHA Res. Oahu	100.0/100.0		
	284/284/284		
Ching, Clarence F. T.	9,669	20.3	
Delaney, Linda L.	8,343	17.5	
Serrao, Joseph F.	5,133	10.8	
Soller, S. C. Tony K.	3,474	7.3	
Sing, Albert K.	2,853	6.0	
Sellers, R. Lunalilo	2,722	5.7	
Epstein, Pearl K.	2,627	5.5	
Blank Votes	11,311	23.8	
Over Votes	1,288	2.7	

[Material Deleted]

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Gov-
ernor of Hawaii; BENJAMIN
CAYETANO, in his capacity
as Lieutenant Governor of
the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

Mary Blaine Johnston
90 Central Avenue
Wailuki, Maui, Hawaii 96793
(808) 244-8750

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

(*Counsel continued on inside cover*)

52174

Paul W. Kahn
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4846

Lawrence G. Sager
Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6100

Alan B. Burdick
920 Mililani Street, Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

QUESTION PRESENTED

Whether Hawaii's blanket prohibition against write-in voting in all elections unreasonably and unjustifiably denies its citizens the right to express their support for individuals of their own choosing and to participate fully and freely in the electoral process, as guaranteed by the United States Constitution.

PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
Statement of Facts	4
Proceedings Below	5
The Opinion Below	8
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. HAWAII'S ABSOLUTE PROHIBI- TION AGAINST WRITE-IN VOTING SERIOUSLY BURDENS CONSTITUTIONAL RIGHTS OF ELECTORAL PARTICIPATION AND POLITICAL EXPRESSION	13
A. Hawaii Denies Petitioner The Opportunity To Cast A Mean- ingful Ballot	19
B. Hawaii Conditions Petitioner's Right Of Electoral Participation Upon The Waiver Of His Right To Remain Free From Espous- ing Ideological Positions That He Does Not Support	23

	<i>Page</i>
C. Hawaii Discriminates Against Petitioner Based Upon The Content Of The Message That He Seeks To Convey	25
II. THE NINTH CIRCUIT MIS- APPLIED THE STANDARDS OF JUDICIAL SCRUTINY URGED BY THIS COURT IN <i>ANDERSON</i> <i>v. CELEBREZZE</i>	32
III. HAWAII'S POLICY CANNOT SURVIVE SERIOUS CONSTITU- TIONAL SCRUTINY	37
CONCLUSION	40

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	<i>passim</i>
<i>Arkansas Writers' Project v. Ragland</i> , 481 U.S. 221 (1987)	27
<i>Barr v. Cardell</i> , 155 N.W. 312 (Iowa 1915)	15, 16
<i>Batey v. Krivanek</i> , Civ. 78-815 (U.S. Dist. Ct., M.D. Fla. 1978)	10
<i>Board of Estimate v. Morris</i> , 489 U.S. 688 (1989)	10, 20, 21
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	33
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	32
<i>Canaan v. Abdelnour</i> , 710 P.2d 268 (Cal. 1985)	9, 17
<i>Carrington v. Rash</i> , 380 U.S. 89 (1965)	33, 35
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	32
<i>Cole v. Tucker</i> , 41 N.E. 681 (Mass. 1895)	15
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1986)	20

	<i>Page</i>
<i>Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989)</i>	8, 9, 17
<i>Dunn v. Blumstein, 405 U.S. 330 (1972)</i>	25, 32, 35
<i>Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989)</i>	passim
<i>Fowler v. Rhode Island, 345 U.S. 67 (1953)</i>	27
<i>Grogan v. Graves, Civ. 90-2378-0 (U.S. Dist. Ct., D.Kan. 1990)</i>	10
<i>Hall v. Simcox, 766 F.2d 1171 (7th Cir.), cert. denied, 474 U.S. 1006 (1985)</i>	10
<i>Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979)</i>	18, 32
<i>Jackson v. Norris, 195 A. 576 (Md. 1937)</i>	15
<i>Jenness v. Fortson, 403 U.S. 431 (1971)</i>	17
<i>Kramer v. Union Free School District, 395 U.S. 621 (1969)</i>	33, 35
<i>Kusper v. Pontikes, 414 U.S. 51 (1973)</i>	18
<i>Lefkowitz v. Cunningham, 431 U.S. 801 (1977)</i>	25

	<i>Page</i>
<i>Littlejohn v. Desch, 121 P. 159 (Colo. 1912)</i>	16
<i>Lubin v. Panish, 415 U.S. 709 (1974)</i>	17
<i>Luther v. Borden, 7 How. 1, 30 (1849)</i>	10, 21
<i>Mandel v. Bradley, 432 U.S. 173 (1977)</i>	32
<i>Mayor of Jackson v. State, 59 So. 873 (Miss. 1912)</i>	16
<i>Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)</i>	27
<i>NAACP v. Button, 371 U.S. 415 (1963)</i>	26
<i>Norman v. Reed, — U.S. —, 60 U.S.L.W. 4075 (Jan. 14, 1992)</i>	34, 35, 36, 40
<i>Oughton v. Black, 61 A. 346 (Pa. 1905)</i>	16, 19
<i>Park v. Rives, 119 P. 1034 (Utah 1911)</i>	16
<i>Patterson v. Hanley, 136 P. 821 (Cal. 1902)</i>	16
<i>Paul v. Indiana Election Bd., 743 F.Supp. 616 (S.D. Ind.1990)</i>	10
<i>Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983)</i>	27

	<i>Page</i>
<i>Police Department v. Mosley</i> , 408 U.S. 92 (1972)	25, 26, 27
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	10, 19, 20, 35
<i>Sanner v. Patton</i> , 40 N.E. 290 (Ill. 1895)	16
<i>Simmons v. United States</i> , 390 U.S. 377 (1968)	25
<i>Simon & Schuster v. New York State Crime Victims Board</i> , U.S. _____, 60 U.S.L.W. 4029 (Dec. 10, 1991)	27, 28, 30, 36
<i>Smith v. Smathers</i> , 372 So.2d 427 (Fla. 1979)	17
<i>Snortum v. Homme</i> , 119 N.W. 59 (Minn. 1909)	16
<i>Socialist Labor Party v. Rhodes</i> , 290 F. Supp. 983 (S.D. Ohio), <i>aff'd in part and modified in part</i> <i>sub nom. Williams v. Rhodes</i> , 393 U.S. 23 (1968)	10
<i>State ex. rel. Lafollette v. Kohler</i> , 228 N.W. 895 (Wis. 1930)	14
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	17, 22, 28, 38
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	31
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	<i>passim</i>

	<i>Page</i>
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	23, 24
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	20, 28, 35
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	24, 36

Statutes and Regulations

28 U.S.C. § 1254(1)	3
F.R. App. P. Rule 40	2
Haw. Rev. Stat. § 11-62	31
Haw. Rev. Stat. § 12-1	3
Haw. Rev. Stat. § 12-2	3
Haw. Rev. Stat. § 12-31	30, 37
Haw. Rev. Stat. § 12-41	3, 39
Haw. Rev. Stat. § 12-42	39
Haw. Rev. Stat. § 16-1	3
Haw. Rev. Stat. § 16-22	3
Haw. Rev. Stat. § 16-26	3
Nev. Rev. Stat. § 24-293.270(2)	8
Okla. Stat. Tit. 26 § 7-127(I)	8
S.D. Codified Laws Ann. § 12-16-1	9

Other Authorities

Batey, "Electoral Graffiti: The Right to Write-in," 5 Nova L.J. 201 (1981)	9, 14, 17
Fredman, L. E., <i>The Australian Ballot: The Story of an American Reform</i> (1968)	13
Michelman, "Conceptions of Democracy: The Case of Voting Rights," 41 Fla. L.Rev. 443 (1989)	23
Recent Development, "First Amendment -- Voters' Speech Rights -- Federal District Courts Mandate Availability of Write-In Voting," 104 Harv.L.Rev. 657 (1990)	9, 31

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

PETITIONER'S BRIEF

OPINIONS BELOW

The June 28, 1991 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 937 F.2d 415 (9th Cir. 1991), and is set forth in the Appendix to the Petition for a Writ of *Certiorari* at 1a-17a. The March 1, 1991 opinion of the Ninth Circuit which was withdrawn and superseded by the June 28, 1991 opinion is reported at 927 F.2d 469 (9th Cir. 1991), and is set forth in the Appendix to the Petition at 18a-31a.

The opinion and order of the United States District Court for the District of Hawaii, dated May 10, 1990, granting plaintiff's motion for summary judgment and permanent injunctive relief is reported at 737 F.Supp. 582 (D.Haw. 1990), and is set forth in the Appendix to the Petition at 32a-51a.

The opinion of the Hawaii Supreme Court, dated July 21, 1989, in response to certified questions from the United States District Court is reported at 776 P.2d 824 (1989), and is set forth in the Appendix to the Petition at 52a-55a.

The July 19, 1988 order certifying questions of Hawaii law to the Supreme Court of Hawaii is unreported. It is set forth in the Appendix to the Petition at 56a-57a. The August 9, 1988 Amended Certification from the United States District Court for the District of Hawaii to the Hawaii Supreme Court is set forth in the Appendix to the Petition at 58a-60a. The May 17, 1988 decision of the United States Court of Appeals for the Ninth Circuit is reported at 846 F.2d 587 (9th Cir. 1988), and is set forth in the Appendix to the Petition at 61a-66a. The decision, order and opinion of the district court, dated September 29, 1986, granting plaintiff's motion for summary judgment and injunctive relief is unreported. It is set forth in the Appendix to the Petition at 67a-77a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered an opinion and judgment in this case on March 1, 1991. Pursuant to F.R. App. P. Rule 40, Burdick's time to file a petition for rehearing with a suggestion of rehearing *en banc* was enlarged from 14 to 21 days by order of the Ninth Circuit, dated April 15, 1991 (See discussion of this matter in Petitioner's Reply To Brief in Opposition at 3-5). Burdick's petition for rehearing with a suggestion for rehearing *en banc* was filed

on March 18, 1991, in compliance with the court of appeals' order of April 15, 1991 and was, therefore, timely filed. On June 28, 1991, the court of appeals withdrew its March 1, 1991 opinion; denied the petition for rehearing; rejected the suggestion for rehearing *en banc*; and entered a new opinion and judgment. A timely petition for a writ of *certiorari* from the June 28, 1991 opinion and judgment of the United States Court of Appeals for the Ninth Circuit was served and filed on September 25, 1991, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Hawaii Revised Statutes §§12-1, 12-2, 12-41, 16-1, 16-22, and 16-26, are set forth in the Appendix to the Petition for a Writ of *Certiorari* at 78a-81a.

STATEMENT OF THE CASE

This case involves the most basic of all constitutional rights -- the right of citizens to vote for the individuals of their choice. Hawaii state officials have interpreted the Hawaii election laws to prohibit citizens from submitting write-in ballots in primary and general elections held for local, state and federal offices. In so doing, Hawaii officials deprive citizens of the right to express their dissatisfaction with the range of choices presented on the ballot and to vote, instead, for individuals of their own personal preference. Moreover, Hawaii's policy effectively compels citizens to express support for candidates with whom they might disagree or suffer the penalty of not voting at all. At issue in this case is whether Hawaii's total ban on write-in voting can withstand the serious judicial scrutiny required by the federal Constitution.

Statement of Facts

Petitioner Alan B. Burdick is a resident and registered voter in the City and County of Honolulu, Hawaii. In recent years, petitioner frequently found himself dissatisfied with the choice of candidates appearing on the ballot. All too often he found that, with respect to some electoral contests, none of the candidates listed on the ballot represented his views or shared his positions on significant public policy matters. He regarded his exercise of the franchise as a civic responsibility. But he found unacceptable the prospect that, in the discharge of this civic responsibility, he should be compelled to choose only among the candidates listed on the ballot or not vote at all. Instead, he regarded write-in voting as an appropriate mechanism by which he could exercise his fundamental right to vote without being compelled to express support for candidates with whom and policy positions with which he disagreed. (J.A.31-33, 38-39, 40-46).¹

Accordingly, in June 1986, petitioner wrote to Hawaii officials inquiring into the state's write-in voting policy. Hawaii officials responded to petitioner's inquiry by informing him that Hawaii law does not explicitly provide for write-in voting and that were he to try to execute a write-in ballot it would not be counted. Subsequently, Hawaii election officials provided Burdick with a copy of an opinion letter, dated July 11, 1986, issued by the Hawaii Attorney General's Office. This opinion letter rested upon the premise that the Hawaii election law contained no provision requiring that write-in voting be permitted. The letter went on to conclude that neither the legislature nor Hawaii election officials were re-

¹ Citations preceded by the letters J.A. refer to the Joint Appendix. Citations preceded by Pet.App. refer to the appendix to the petition for *certiorari*. Citations preceded by Op.Cert.App. refer to the appendix to respondents' brief in opposition to the petition for *certiorari*.

quired, as a matter of constitutional principle, to permit write-in voting. (J.A.36).

Burdick was especially concerned about this interpretation of Hawaii law because, during the 1986 electoral season, the State House of Representatives election held in the district in which Burdick lived featured only one candidate, running unopposed. Burdick had no interest in voting for that candidate. He did, however, wish to exercise his franchise by casting a write-in ballot expressing his opposition to the single choice on the state-prepared ballot. Having already been told that write-in voting was impermissible under Hawaii law, Burdick brought this lawsuit challenging Hawaii's refusal to permit his expression of political dissent at the polling booth. (J.A.32).

Proceedings Below

Petitioner filed suit in August, 1986 in the United States District Court of Hawaii. The suit alleged that the denial of petitioner's right to cast a write-in ballot for the person or persons of his choice violated, *inter alia*, the First and Fourteenth Amendments to the federal Constitution and that it violated, as well, the Hawaii Constitution.

The district court held that Hawaii's refusal to permit write-in voting constituted a violation of petitioner's freedom of expression and right of political association. Accordingly, the district court issued injunctive relief directing Hawaii to provide for the casting and counting of write-in votes in the November, 1986 elections. (Pet. App. 67a-78a). The state moved, in the district court, for a stay of the injunction pending appeal and the motion was denied.

An appeal was taken to the Court of Appeals for the Ninth Circuit which stayed the injunction pending dispo-

sition of the appeal. On May 17, 1988,² the Ninth Circuit reversed and directed the district court to abstain -- under the *Pullman* abstention doctrine -- from reaching the federal constitutional questions on the ground that the case raised outstanding questions of state law that needed to be resolved prior to any federal constitutional adjudication of this controversy. (Pet.App. 61a).

On remand, the district court certified three questions to the Hawaii Supreme Court. (Pet.App. 56a-57a, 58a-60a). The questions, seeking interpretations of state law and of the state constitution exclusively,³ were as follows:

- (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
- (3) Do Hawaii's election laws permit, but not

² Fearing that the Ninth Circuit might not decide the appeal prior to the September, 1988 primary election, Burdick filed a second suit entitled, *Burdick v. Cayetano*, Civil No. 88-0365, seeking relief in connection with the then forthcoming 1988 elections. Burdick filed the second suit on May 17, 1988 unaware that, on that same day, the Ninth Circuit had decided the appeal in the first suit. The two actions were later consolidated at the district court and on appeal. (J.A.142, 211).

³ Contrary to the arguments subsequently advanced by the State of Hawaii in the Ninth Circuit and in opposing certiorari review by this Court, the certified questions presented to the Hawaii Supreme Court involved only questions of state law. As can be plainly seen from the text of the questions certified by the federal District Court to the Hawaii Supreme Court, no issues involving federal law were presented to the Hawaii Supreme Court.

require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

In an opinion issued on July 21, 1989, the Hawaii Supreme Court answered each of the certified questions in the negative, concluding that Hawaii law prohibited write-in voting and that such a prohibition was entirely consistent with the Hawaii Constitution. (Pet.App. 52a-55a).

Burdick thereupon renewed his motion for summary judgment in the federal district court. On May 10, 1990, the district court again declared that Hawaii's prohibition against write-in voting violated the federal constitution. And, again the district Court granted petitioner's motion for summary judgment and injunctive relief.⁴ Unlike the previous occasion, however, in this instance, the district court stayed its mandate pending appeal. (Pet.App. 32a-51a).

On appeal for a second time, the Ninth Circuit reached the merits and reversed the judgment of the district court in an opinion issued March 1, 1991. (Pet. App. 18a-31a). Burdick petitioned for rehearing with a suggestion of rehearing *en banc*. On June 28, 1991, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. At the same time, the court of appeals withdrew its March 1, 1991 opinion and issued a new opinion which again reversed

⁴ The district court's initial order included a permanent injunction, the terms of which were not specified, and a preliminary injunction directing state officials to count, record and tabulate all write-in votes in connection with the November 1986 election. (Pet.App. 77a). In its second opinion, the district court held Hawaii's policy unconstitutional and granted "plaintiff's motion for summary judgment and for permanent injunctive relief," (Pet.App. 51a) without specifying the terms of the injunction. The Ninth Circuit's reference to a "preliminary injunction" (Pet.App. 7a) is, therefore, incorrect.

the district court's decision granting Burdick's motion for summary judgment and injunctive relief. (Pet.App. 1a-17a). A petition for a writ of *certiorari* was timely served and filed in this Court on September 25, 1991.

The Opinion Below

In reversing the district court's decision, the Ninth Circuit adopted a narrow conception of the constitutional right of electoral participation and concluded that Hawaii's restriction on write-in voting did not impose a "substantial burden" either on Burdick's right to vote or on his right of political expression. (Pet.App. 11a). On the basis of this conclusion, the court engaged in only a casual review of the state's proffered justifications for its policy. The Ninth Circuit found that the prohibition against write-in voting served three interests: an interest in "political stability;" an interest in "an informed electorate;" and an interest in permitting candidates for certain elected offices, who emerge from the primary election without opposition, to take office without running in the general elections. But, the court of appeals never asked whether Hawaii's total ban against write-in voting was "necessary" or "narrowly tailored" to the pursuit of these interests.

In reaching its conclusions, the Ninth Circuit recognized that its decision was inconsistent with the conception of the franchise adopted by the Fourth Circuit in *Dixon v. Maryland State Admin. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989). (Pet.App. 14a). The decision of the Ninth Circuit also allowed Hawaii to remain out of step with most other jurisdictions in this country that permit write-in voting, at least in general elections.⁵ It

⁵ According to a 1990 Harvard Law Review note three states, in addition to Hawaii, impose a complete ban on write-in voting. Those three states are Nevada, Nev. Rev. Stat. § 24-293.270(2)(1987); Okla. (continued...)

was at odds with the constitutionally based decisions of the highest courts in many of those jurisdictions. Indeed, there has developed a deep and longstanding tradition among state courts requiring that write-in voting be made available.⁶ And, prior to the Ninth Circuit decision in this case, a smaller body of federal court rulings had also pointed decidedly in favor of a constitutionally protected right to cast a write-in ballot. The decision of the Ninth Circuit was at odds with these decisions, as well.⁷

⁵ (...continued)

Idaho, Okla. Stat. Tit. 26 § 7-127(1)(Supp. 1989); and South Dakota, S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990). Recent Development, "First Amendment -- Voters' Speech Rights -- Federal District Courts Mandate Availability of Write-In Voting," 104 Harv.L. Rev. 657, 662 n.44 (1990)(hereinafter cited as "Voters' Speech Rights").

The note further identified eight states that permit write-in voting in general elections but prohibit such voting in primary elections. *Id.* at 662 n.45. And the note identified "[a]t least 16 states [that] require some form of pre-registration by write-in candidates." *See id.* at 663 n.47. The remaining states apparently permit write-in voting in primary as well as general elections without significant limitation.

⁶ A few of these state courts -- most notably the Supreme Court of California in *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) -- have held that the right to cast a write-in ballot is protected by both the federal and state constitutions. A larger number of state courts have relied exclusively on their own state constitutions in upholding write-in voting. But, as the California Supreme Court also noted in *Canaan*, other "courts have construed statutes which were silent on the issue to allow write-in voting to avoid constitutional difficulties" and still others "have expressed in dicta that voters have the constitutional right to write-in the candidates of their choice." *Id.* at 282 n.22. The range of state court decisions is collected in *Canaan*. *Id.*

While the weight of state court authority strongly favors write-in voting, the case-law is not unanimous with respect to this matter. For a list of contrary cases, *see* Batey, "Electoral Graffiti: The Right to Write-in," 5 Nova L.J. 201, 206 n.31 (1981).

⁷ In addition to *Dixon*, federal courts conferred constitutional protec- (continued...)

Finally, but most importantly, the Ninth Circuit decision resting, as it did, upon a constricted vision of the constitutional interests at stake in this case, misapplied this Court's jurisprudence respecting rights of political participation and expression. These matters will be amplified in the Argument set forth below.

SUMMARY OF ARGUMENT

At the very core of our constitutional system is an abiding commitment to representative democracy. And the essence of representative democracy is its insistence that "each and every citizen has an inalienable right to full and effective participation in the political processes" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Each individual has the right to direct his or her "portion of sovereign power" to the ultimate end of advancing those governmental outcomes that he or she chooses to sponsor. *Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989)(quoting *Luther v. Borden*, 7 How. 1, 30 (1849) (statement of counsel, Daniel Webster)).

Voting is the critical act of political participation in a democracy. By lending or refusing to lend the support of their votes to candidates, members of a political community affect democratic outcomes in a variety of ways. Obviously, each voter gives or withholds one vote from the candidate in question and thus incrementally increases or decreases the likelihood that the candidate

⁷ (...continued)

tion on write-in ballots in *Paul v. Indiana Election Bd.*, 743 F.Supp. 616, 626 (S.D. Ind.1990); *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 990 (S.D. Ohio), *aff'd in part and modified in part sub nom. Williams v. Rhodes*, 393 U.S. 23 (1968); and in *Grogan v. Graves*, Civ. 90-2378-0 (U.S. Dist. Ct., D.Kan. 1990)(unreported opinion). But see *Batey v. Krivanek*, Civ. 78-815 (U.S. Dist. Ct., M.D. Fla. 1978)(unreported opinion); see also *Hall v. Simcox*, 766 F.2d 1171 (7th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

will be elected; but this is just part of the meaning and significance of a vote. By giving or withholding their votes, citizens demonstrate in the most convincing way possible -- through the formal commitment of the ballot -- what persons, parties and policies they are prepared to support or reject. By the solemnity and formality of the ballot, voters express their preferences to each other, to those presently holding public office, to present and prospective candidates for office, and to the political parties which underwrite those candidacies. Voting is thus a complex act of political participation, consisting at once of expression, commitment and choice.

Hawaii is one of a very small minority of states that have allowed the state-prepared ballot -- which was introduced to facilitate the sovereign choice of voters -- to stifle that choice by foreclosing entirely the casting of write-in votes. By prohibiting write-in voting, Hawaii violates principles of political participation and expression which are the foundation of our constitutional democracy. Indeed, Hawaii's policy of compelling voters to choose only among those candidates listed on the ballot or not to vote at all offends three distinct -- although, in this case, interrelated -- constitutional principles.

First, when Hawaii denies petitioner the opportunity to cast a write-in vote for the person of his choice, in circumstances where none of the listed candidates are acceptable to him, it leaves him with a meaningless ballot. Without the opportunity to cast a write-in ballot, in these circumstances, petitioner's electoral franchise is effectively nullified. He cannot direct his "portion of sovereign power" to a candidate of his own choosing. And he is not even permitted to use his vote to express his dissent from the candidates offered on the state-prepared ballot. In these circumstances -- where none of the listed candidates are acceptable to him -- he is given no genuine opportunity to participate in the election.

Second, Hawaii's policy effectively imposes a form of

ideological adherence upon those who feel voting to be a civic responsibility but can find no acceptable candidate on the ballot. Hawaii gives voters the choice of either expressing support for candidates with whom and policies with which they disagree or not voting at all. It, thereby, conditions the right to vote upon the waiver of one's independent First Amendment right to remain free from being forced to express support for ideological positions or individuals with which one disagrees.

Third, Hawaii's policy violates First Amendment neutrality principles when it declares that the ballot may be used only to express support for the candidates listed on the ballot but not to convey the message: "None of the above." In essence, Hawaii discriminates against voters wishing to express dissent in this fashion and does so on the basis of the content of the voter's political message.

The court of appeals upheld Hawaii's policy only by adopting a narrow and ultimately erroneous conception of the fundamental right to vote. The court ignored the central meaning of the franchise as a critically important form of political participation and expression. It compounded this error by casually accepting the state's proffered justifications for the policy without ever seriously asking whether that policy is "necessary" to the advancement of any legitimate or compelling state interests. No such showing can be made here. Not one of the interests Hawaii puts forth justifies a total ban on write-in voting. Accordingly, Hawaii's total ban on write-in voting cannot survive the heightened constitutional scrutiny required.

In advancing this challenge, petitioner does not suggest that the state is obligated to permit a write-in candidate to serve in an office for which he or she is not qualified under state law. The constitutionality of any limitations on those seeking to hold public office must be judged on their own terms. Those terms are not an

issue in this lawsuit. Nor does petitioner challenge the manner in which candidates acquire positions on the state-prepared ballot. This is not a ballot access case. In this case Hawaii has imposed a blanket prohibition against all write-in voting. This blanket prohibition is the focus of petitioner Burdick's constitutional challenge.

ARGUMENT

I. HAWAII'S ABSOLUTE PROHIBITION AGAINST WRITE-IN VOTING SERIOUSLY BURDENS CONSTITUTIONAL RIGHTS OF ELECTORAL PARTICIPATION AND POLITICAL EXPRESSION

Write-in ballots did not become a matter of note or democratic consequence until late in the nineteenth century, when the system of state-prepared ballots, commonly described as the Australian Ballot system, was first introduced in this country.⁸ The idea of a government-printed ballot was seen as a progressive reform designed to reduce a variety of fraudulent election practices. Its end was to make elections better express the actual, free choice of voters by increasing voter secrecy, reducing the corruption of party politics and protecting the integrity of the process. One hundred years later, instead of protecting voter choice, the state-prepared ballot in Hawaii has become an impediment to free choice.

Prior to the turn of the century, citizens were sover-

⁸ The Australian Ballot was first introduced in this country, in 1888, in connection with local elections held in Louisville, Kentucky. Later that same year, Massachusetts enacted a state-wide law mandating a state-prepared ballot. By the presidential election of 1892, "thirty-eight states had passed Australian Ballot laws in one form or another." L. E. Fredman, *The Australian Ballot: The Story of an American Reform* IX (1968).

eign over their voting preferences as a matter of course. They were free to prepare their own ballots, use pre-printed tickets offered by one of the political parties, or alter the political parties' tickets to suit their personal preferences. In effect, all ballots were write-in ballots.⁹ The Wisconsin Supreme Court summarized these free-wheeling ballot practices:

In the beginning the regulations were few and simple. Persons went to the voting places fixed by law and there delivered to officers whose duties were prescribed by statute a paper upon which they signified their choice of officers. The ballots might be written, printed, partly written, partly printed, and any sort of combination of persons who were candidates might be printed or written upon a ballot.

State ex. rel. Lafollette v. Kohler, 228 N.W. 895, 906 (Wis. 1930).

The broad adoption of the Australian Ballot near the turn of the century reduced the disorder of the earlier system and blunted some of the abuses that came with that disorder. But, it was quickly and widely recognized that the Australian Ballot, if untempered by the opportunity for voters to write-in the candidates of their choice, would impose a narrow regimentation on the right to vote which was at sharp odds with the exercise of personal sovereignty contemplated by democracy. State court after state court heard the complaints of voters frustrated in their choices at the voting booth, and the vast majority responded by finding a right to cast a write-in vote somewhere in state law.¹⁰ State constitu-

⁹ See Reynolds and McCormick, "Outlawing 'Treachery': Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910," 72 *The Journal of American History* 835, 844 (March, 1986).

¹⁰ But see Batey, *supra* at 206 n.31.

tions were occasionally the formal source of this right, and a simple but eloquent vision of free and equal political participation was often the explicit predicate of legal judgment in these cases.¹¹

In upholding write-in voting, many of these courts spoke pointedly to the nature of the right to vote and to the disenfranchisement that would occur if citizens could not vote "according to their own free and unrestricted choice." *Barr v. Cardell*, 155 N.W. 312, 315 (Iowa 1915). For example, in upholding write-in voting the Supreme Court of Illinois observed:

It is claimed that section 14 prohibits the voter from writing on the ballot the name of a person who has not been nominated . . . and that it is the intention of the act that no vote should be cast for a person who was not nominated [I]f the construction contended for by appellee be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and when this right is taken away there is nothing left worthy of the name of the right of suffrage -- the boasted free ballot becomes a delu-

¹¹ The Supreme Judicial Court of Massachusetts summarized this judicial development at the time.

In general, it may be said that the so-called 'Australian Ballot Acts, in the various forms in which they have been enacted in many of the states of this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he please, by leaving blank spaces on the official ballot, in which he may write, or insert in any other proper manner, the names of such persons, and by giving him the means, and a reasonable opportunity, to insert or write in such names.

Cole v. Tucker, 41 N.E. 681 (Mass. 1895). See also *Jackson v. Norris*, 195 A. 576, 585 (Md. 1937).

sion.

Sanner v. Patton, 40 N.E. 290, 292-93 (Ill. 1895).¹² Moreover, other state courts, during this period, assumed the right to cast a write-in ballot to be beyond dispute even as they addressed other election law issues. For example, the Supreme Court of Pennsylvania, in reviewing a challenge to the format of Philadelphia's printed ballot, accepted write-in voting as an inherent feature of a fair electoral process:

Unless there was such provision to enable the voter not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way.

Oughton v. Black, 61 A. 346, 348 (Pa. 1905). The California Supreme Court, in resolving an election controversy over certain disputed ballots, similarly noted in passing:

Under every form of ballot of which we have had any experience the voter has been allowed -- and it seems to be agreed that he must be allowed -- the privilege of casting his vote for any person for any office by writing his name in the proper place.

Patterson v. Hanley, 136 P. 821, 823 (Cal. 1902).

These opinions exemplified a broad recognition

¹² During the period shortly after the introduction of the Australian Ballot, numerous state courts upheld write-in voting either as matter of statutory interpretation or constitutional entitlement. See, e.g., *Barr v. Cardell*, 155 N.W. 312; *Snortum v. Homme*, 119 N.W. 59 (Minn. 1909); *Mayor of Jackson v. State*, 59 So. 873 (Miss. 1912); *Park v. Rives*, 119 P. 1034 (Utah 1911); *Littlejohn v. Desch*, 121 P. 159 (Colo. 1912).

among the state courts that some write-in ballot opportunity is essential to free and fair political participation among citizens who have widely divergent political values and goals. More recent state court decisions have confirmed these earlier judgments.¹³ As the Supreme Court of Florida Court observed: "We believe the right of each elector [to vote] for a write-in candidate is as important now as it was in 1893." *Smith v. Smathers*, 372 So.2d 427, 429 (Fla. 1979).

This Court, while never considering directly the question of a federal constitutional right to a write-in ballot, has recognized the importance of the write-in ballot as a release from the constraints of ballot access requirements. *Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).¹⁴ And, as noted above, the Court of Appeals for the Fourth Circuit has recently found a federal constitutional right to cast a write-in vote inherent in this Court's jurisprudence. *Dixon*, 878 F.2d 776.

What unites this widely shared and durable understanding of the political process -- and distinguishes it from the decision below by the Ninth Circuit -- is a recognition that voting involves far more than the static choice among candidates listed on a ballot. Elections are a dynamic part of political discourse and growth within a democratic community; they are "a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 788.

Voters associate with each other and with candidates

¹³ See *Canaan*, 710 P.2d at 282 n.22 (collecting cases). But see *Batey*, *supra* at 206 n.31.

¹⁴ But see *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983) (recognizing that the availability of write-in voting is not sufficient to overcome otherwise unconstitutional ballot access laws); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974)(same).

"for the common advancement of political beliefs and ideas [in] a form of 'orderly group activity' protected by the First and Fourteenth Amendments [citations omitted]." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). And, indeed, this Court has noted that this form of political association and expression is deserving of constitutional protection even if it is not likely to result in a successful electoral outcome. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979). Participation in the process is as important as directly affecting the result because "an election campaign is a means of disseminating ideas as well as attaining political office." *Id.* at 186.

In this regard, this Court has also held that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989). But, political speech does not end with the campaign. It continues right into the voting booth when the voter expresses what he or she has come to believe in the course of that campaign. Thus, the casting of one's ballot -- which is, itself, the very act of democratic decisionmaking -- deserves no less constitutional protection than campaign speech. Even more than other forms of political expression, voting is the one expressive act that occurs "at the crucial juncture at which the appeal to common principles may be translated into concerted action and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986).

Beyond serving as a medium for political expression, voting is also an act of civic commitment that flows from and is tethered to our concept of representative democracy. It is an axiom of our constitutional faith that representative democracy rests upon the "consent of the governed." And this "consent" is, in turn, obtained through an election process in which each citizen has the

right to participate and, in so doing, to exercise "his [or her] own individual will in his [or her] own way." *Oughton*, 61 A. at 348. So understood, voting constitutes a personal act of political participation that -- more than any other undertaking by a citizen -- signifies one's status as a member of the political community. When the state imposes conditions on the vote that make it impossible for citizens to participate meaningfully at the polls, it denies them their full citizenship and undermines the consent upon which government itself must rely.

Hawaii's policy of prohibiting all write-in votes seriously burdens both the participatory and expressive aspects of voting. It does so in three ways that are of constitutional import. First, it debases petitioner's right to vote. Hawaii's policy left petitioner, in the circumstances that gave rise to this suit, without a meaningful ballot and, in so doing, denied him the right to participate fully and effectively in the electoral process. Through its blanket prohibition of write-in voting, Hawaii continues to impose this form of disenfranchisement. Second, Hawaii's challenged policy conditions petitioner's right of electoral participation upon the waiver of his First Amendment right to remain free from espousing ideological positions that he does not support. Third, it discriminates against petitioner based upon the content of the message that he seeks to convey at the ballot box.

A. Hawaii Denies Petitioner The Opportunity To Cast A Meaningful Ballot

This Court has often recognized that disenfranchisement can occur when one is forced to execute an ineffective ballot just as it can occur when one is entirely denied the right to vote. This point was made, most forcefully, in *Reynolds*, 377 U.S. at 555:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right

strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

In *Reynolds* and in the "one person, one vote" cases that followed, this Court was, of course, concerned with the numerical debasement of the franchise. But the concern with electoral arrangements that dilute a citizen's political voice and that render less effective the voter's right of electoral participation goes well beyond issues of numerical equality.¹⁵

This sense was captured by Justice White who, writing for the Court in *Morris*, 489 U.S. at 693, looked back at this Court's "one person, one vote" cases and observed:

These cases are based on the propositions that in this country the people govern themselves through their elected representatives and that "each and every citizen has an inalienable right to full and effective participation in the political processes" of the legislative bodies of the Nation, State or locality as the case may be. *Reynolds v. Sims*, 377 U.S. at 565. Since "[m]ost citizens can achieve this participation only as qualified voters through the election of legislators to represent them," full and effective participa-

¹⁵ For just this reason, the Court has held justiciable challenges to reapportionment schemes that provide quantitative equality, but result in a qualitative dilution of the vote. See *Davis v. Bandemer*, 478 U.S. 109 (1986). Moreover, this Court has also insisted that government administer the franchise as the vehicle for the people's voice, and not as a mechanism for the entrenchment of interests, parties or particular points of view. See *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

tion requires "that each citizen have an equally effective voice in the election of members of his . . . legislature." *Ibid.* As Daniel Webster once said, "the right to choose a representative is every man's portion of sovereign power." *Luther v. Borden*, 7 How 1, 30, 12 L.Ed. 581 (1849)(statement of counsel).

Hawaii's total prohibition against write-in voting has denied petitioner "full and effective participation in the political processes" and continues to do so. For example, upon entering the polling booth during the 1986 election, Burdick was given a ballot listing only one candidate for the State House of Representatives in his legislative district. He found that candidate unacceptable but was denied the opportunity to cast a write-in ballot. In that circumstance, he simply could not participate in the State House of Representatives election held in his district. The ballot he received was utterly meaningless to him. A similar debasement of his franchise occurs whenever petitioner confronts a ballot listing only a candidate or candidates that he cannot support and he is given no opportunity to express his own views through the ballot.

In these circumstances, petitioner is undoubtedly denied his right to "full and effective participation" in the electoral process as well as his right to an "equally effective voice" in the election just as surely as the voters whose rights were unconstitutionally abridged in *Reynolds* or in *Morris*. So understood, debasement of the franchise can be as severe -- perhaps even more so -- when a voter is given an ineffective ballot at the polling booth as when the voter is disadvantaged by a malapportioned districting arrangement. Malapportioned districts leave some voters with unequal influence over the legislative process. But, the voter in an underrepresented district still has the opportunity to express his or her

political point of view by casting a ballot. By contrast, when a voter is presented a meaningless ballot, such voter is left with no opportunity, at all, to express himself or herself at the polls.

To be sure, states may limit the number of candidates appearing on the ballot in order to ensure that elections are conducted fairly and honestly and with a minimum of confusion for the voters. *Storer*, 415 U.S. at 732. But, petitioner does not insist that the State of Hawaii place the name of his preferred candidate on the state's official ballot. This is not a ballot access case. Petitioner asks only that he be permitted to participate in the political process by expressing his personal opposition to the candidates listed on the ballot and to vote, instead, for an alternative preference.

By denying petitioner that alternative, the State of Hawaii seriously burdens his constitutional right to vote. It is no answer to the disenfranchisement thus effected to suggest, as the Ninth Circuit did below, that petitioner has "ample alternative channels" to express his dissent from the candidates listed on the ballot and that he can always articulate his opposition to these candidates in some other forum. Presumably, under the Ninth Circuit's view, petitioner could always pass out leaflets to express his opposition to the candidates listed on the ballot. But, contrary to the reasoning of the Ninth Circuit, voting for a candidate and leafletting in support of that candidate are not equivalent constitutional acts. In both instances, the substantive message may be the same. And yet, for the reasons suggested above, street-corner leafletting is no substitute for voting.

The exercise of the franchise involves a very special form of political expression that necessarily involves the act of electoral participation.¹⁶ In failing to provide the

¹⁶ This special quality has been described as "a voice backed by a (continued...)"

option of write-in voting, Hawaii denies petitioner that right to participate meaningfully in the essential civic event of representative democracy -- the election of those who make the laws under which we all must live.

B. Hawaii Conditions Petitioner's Right Of Electoral Participation Upon The Waiver Of His Right To Remain Free From Espousing Ideological Positions That He Does Not Support

Of course, petitioner could have participated in the 1986 state legislative election in question here,¹⁷ if he had been prepared to vote for a candidate that he found unacceptable. But in this circumstance, petitioner's right of electoral participation would have been conditioned upon his waiver of his First Amendment right not to espouse ideological positions with which he disagreed.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court held that the First Amendment right of individuals to maintain their own political views and opinions barred the state from compelling school children to participate in a flag salute ceremony. Justice Jackson, writing for the Court, noted:

There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of

¹⁶ (...continued)

vote." Michelman, "Conceptions of Democracy: The Case of Voting Rights," 41 Fla. Law Rev. 443, 451 (1989).

¹⁷ In 1986, as in preceding and subsequent elections, petitioner did participate to the degree that he voted for those candidates appearing on the ballot that he could support. But, since every electoral contest must be treated as a distinct election, petitioner could not participate in the 1986 state legislative race where, as noted above, the only candidate running was an individual for whom Burdick could not vote.

Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

Id. at 641.

The First Amendment prohibition against compelled expression was subsequently extended in *Wooley v. Maynard*, 430 U.S. 705 (1977). The *Wooley* case involved a statute that prohibited motorists from obscuring or defacing the state motto as it appeared on New Hampshire automobile license plates. Motorists who objected to the motto on religious and conscientious grounds wanted to cover the motto on the license plate of their car and requested equitable relief to permit them to do so. Finding in favor of the motorists, this Court reasserted "the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking. . . ." *Id.* at 714.

Of course, the motorists in *Wooley* could have avoided the compelled expression mandated by state law if they had simply refrained from owning or driving a car. Nevertheless, the *Wooley* Court recognized that conditioning the ownership of an automobile -- one of the necessities of modern life -- upon the waiver of one's First Amendment right to be free from compelled ideological expression was itself an impermissible condition. The *Wooley* Court concluded that New Hampshire could not constitutionally "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

The principles of *Wooley v. Maynard* apply with at least equal force to the present controversy. In *Wooley*, New Hampshire provided the motorists with a choice of espousing a message with which they disagreed or not driving a car. In this case, Hawaii provides petitioner

with the choice of expressing support for candidates with whom he disagrees or not voting in certain electoral contests. Accordingly, in this case, Hawaii is conditioning one constitutional right -- the right not to espouse views with which one disagrees -- upon the waiver on another constitutional right -- the right to vote.

This Court, however, has previously recognized that a state may not require its citizens "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808-09 (1977). See also *Dunn v. Blumstein*, 405 U.S. 330 (1972) (state cannot force a choice between constitutional right to vote and constitutional right to travel); *Simmons v. United States*, 390 U.S. 377 (1968) (Fourth Amendment right cannot be conditioned on waiver of Fifth Amendment rights).

If as in *Cunningham* it is unconstitutional to condition the right of political association on the waiver of one's Fifth Amendment rights; and if, as in *Dunn*, it is unconstitutional to condition the right to travel on the waiver of one's right to vote; it must surely be unconstitutional to condition one's right to vote -- as Hawaii does here -- on the waiver of one's First Amendment right not to express support for a candidate with whom one disagrees.

C. Hawaii Discriminates Against Petitioner Based Upon The Content Of The Message That He Seeks To Convey

Our system of free expression is built upon the proposition that, as a general matter, government must remain neutral with respect to the expressive activities of its citizens. This Court has repeatedly insisted that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

Police Department v. Mosley, 408 U.S. 92, 95 (1972).

The First Amendment's prohibition against government favoring certain speakers because of the content of their speech extends to a prohibition against the state favoring or disfavoring certain citizens because of their political affiliation or favoring others because of the popularity or social utility of their ideas. Thus, in *NAACP v. Button*, 371 U.S. 415, 444-45 (1963), the Court observed:

[T]he Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered.

And, in *Southeastern Promotions v. Conrad*, 420 U.S. 546, 572 n.2 (1975), Chief Justice Rehnquist, although dissenting on other grounds, observed that "[a] municipal auditorium which opened itself up to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment."

In *Mosley*, 408 U.S. at 96, the Court summarized these doctrinal principles:

[U]nder the Equal Protection clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, govern-

ment may not prohibit others from assembling or speaking on the basis of what they intend to say.¹⁸

While this neutrality principle is most frequently invoked where the state has either created a public forum or where a government agency is supervising First Amendment access to a public facility, the doctrine has not been limited to those circumstances. Thus, this Court has applied the First Amendment neutrality principle to invalidate state laws that imposed disparate financial burdens on publications based upon the content of those publications. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987). And earlier this term, the Court invalidated New York's "Son of Sam" law on the grounds that it imposed a special financial burden on certain authors based upon the content of their writings. *Simon & Schuster v. New York State Crime Victims Board*, ___ U.S. ___, 60 U.S.L.W. 4029 (Dec. 10, 1991).

To understand the scope of the neutrality principle in any particular setting or with respect to any particular activity often requires attention to the history of government regulation of that setting or activity. See *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 44-45 (1983). In this regard, neutrality acquires special significance when government regulates the ballot. The history of the vote in this country demonstrates that the voting booth is an important medium for the direct expression of individual views. Regulation of the ballot

¹⁸ As the preceding discussion from the *Mosley* opinion suggests, there may be some disagreement as to whether the neutrality principle derives its doctrinal source from the First Amendment or the Equal Protection Clause. See, e.g., Justice Frankfurter's opinion in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter concurring). But, whatever its source, the neutrality principle is firmly established within our constitutional jurisprudence.

came late and even when it came it was accompanied, in most jurisdictions, by the safety-valve of write-in voting.¹⁹ The polling booth was traditionally and appropriately seen as a kind of government sponsored forum in which every voter had an unrestrained, and, therefore, equal right to express his electoral preferences.

This historical tradition is explained by and, in turn, reinforces a common impulse and understanding that the voting booth represents the principal medium through which the entire citizenry of a community engages in a vital form of political expression. It follows that any attempt by the state to stifle the electoral message of any duly qualified voter -- and to do so on the basis of the content of that message -- implicates the neutrality principle and requires that the state come forward with very good reasons for doing so. "The First Amendment presumptively places this sort of [content-based] discrimination beyond the power of the Government." *Simon & Schuster*, 60 U.S.L.W. at 4032.

There are good reasons for Hawaii to regulate the electoral process so as to ensure that elections are conducted fairly and honestly and with a minimum of confusion for the voter. *Storer*, 415 U.S. at 732. To that end, it was entirely appropriate for states to assume -- as they did at the close of the Nineteenth Century -- the responsibility of preparing the ballot for the convenience of the voters and to avoid election fraud. And because a printed ballot can only list a finite number of candidates, it is well understood that, in preparing the ballot, states must develop fair and reasonable rules to decide which candidates should appear on the ballot and which candidates should be excluded. But, in developing these rules, the First Amendment neutrality principle dictates that the state cannot regulate access to the state-prepared ballot in a way that favors certain political parties or ideologies

¹⁹ See pp.16-17 *supra*.

over others. *Williams v. Rhodes*, 393 U.S. at 32. Thus, the neutrality principle applies even when the state prepares its official ballot.

The neutrality principle applies here, as well. By banning all write-in votes, Hawaii has exceeded its role as a neutral referee and has, in effect, told voters that they can express support for any of the candidates listed on the ballot but they cannot submit a ballot to convey the message: "none of the above." In this case, Hawaii confronts the voter who believes that radical change outside the conventional candidates and parties is required and who wants to convey that message by voting "no." Hawaii tells this voter that this message cannot be conveyed at the ballot box. Hawaii discriminates against such a dissident²⁰ on the basis of the content of his or her message. In so doing, Hawaii transgresses First Amendment neutrality principles.

It is no response to this argument to suggest that this critic can always express his or her dissent by not voting. If petitioner is denied the opportunity to express his views through the ballot and if he chooses, as a consequence, not to vote in that electoral contest, he will be

²⁰ But, one need not be a political extremist in order to feel compelled to express dissent at the polls. A mainstream voter may well experience a situation where none of the candidates listed on the ballot is acceptable. Such a voter may have even previously supported a candidate listed on the ballot, at the primary election, only to discover during the political campaign leading up to the general election that he or she can no longer support that candidate. During the course of the campaign the voter might discover that the candidate's positions have changed; or that the voter's original understanding of the candidate's positions was wrong; or that new developments render the candidate unacceptable to the voter. In such circumstances, the voter may be unable to vote for the candidate that he or she initially supported and may also remain at ideological odds with the other candidate or candidates. When this occurs, the voter must retain the option of casting a write-in ballot against all the listed candidates. The voter must retain the option of registering a dissent.

perceived as an apathetic citizen -- not a dissident. There is a world of difference -- a constitutionally significant difference -- between not voting and voting "none of the above." Only the second activity permits petitioner to register formally his message of dissent. In discussing the constitutional prohibition against government censoring the content of a citizen's message, the Court in *Simon & Schuster*, 60 U.S.L.W. at 4032, observed:

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Individual dignity and choice are no less at issue in the polling booth.

It is also no answer to this concern to urge, as the Ninth Circuit did below, that Hawaii law provides candidates with easy access to the ballot. For even if, *arguendo*, Hawaii's ballot access laws were quite liberal,²¹ it is

²¹ In fact, Hawaii is not a state where candidates or minor parties can easily gain access to the general election ballot and thereby present a serious challenge to the political *status quo*. For, even if an independent candidate were to gain access to the primary ballot it will be quite difficult for such a candidate to move from the primary to the general election ballot. The reason for this is that when a citizen of Hawaii enters the polling site on primary day, that citizen must choose to vote in either the Democratic, Republican or Libertarian primary election or, in the alternative, may choose to vote on a nonpartisan ballot consisting of the names of independent candidates. Haw. Rev. Stat. §12-31. (Op.Cert.App. 45a-46a). Not surprisingly, very few voters choose the nonpartisan ballot. Nevertheless, Hawaii law requires that, to secure a place on the general election ballot, an independent candidate

(continued...)

inevitable that at some point the state would be required to limit the number of candidates appearing on the ballot. And any such limitation would undoubtedly leave some voters, at some time, without a candidate that they can support. Thus, Hawaii could not escape the issues raised by this case even if it were extraordinarily liberal in granting candidates access to the ballot.

Properly understood, therefore, this is not a case about Hawaii's ballot access laws.²² This is a case about the voter's personal and fundamental right to say "no" to all of the candidates listed on the ballot and to express an alternative preference. Accordingly, this case requires the State of Hawaii to explain why, contrary to the practice and tradition in most other states, it is necessary to deny Hawaii's voters this basic right.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51

²¹ (...continued)

must obtain either 10% of the votes cast for that office in the primary election or as many votes as the partisan victor with the fewest votes. Haw. Rev. Stat. §12-41. This requirement serves as a serious impediment to the general election ballot. Thus, contrary to the suggestion of the Ninth Circuit, it is quite difficult for an independent candidate to gain access to the general election ballot in Hawaii.

It is similarly difficult for a minor party to gain access to the general election ballot. While the Ninth Circuit correctly noted that Hawaii requires petitions signed by only 1% of the total registered state voters for a new party to gain access to the ballot, the court of appeals ignored the fact that Hawaii also requires that these petitions be filed 150 days (5 months) prior to the primary election. Haw. Rev. Stat. §11-62. (Op.Cert.App. 64a-65a). This extraordinarily early filing deadline, again, makes Hawaii a state where access to the general election ballot is not easy.

²² Hawaii could, perhaps, require persons seeking election as write-in candidates to register prior to the election in order to be eligible to hold office, so long as the registration requirements were reasonable. See *Voters' Speech Rights*, note 5 *supra*, at 662 n.45. Hawaii, however, has not chosen to enact a registration requirement. Instead, Hawaii totally prohibits write-in voting. It is that total prohibition which is the subject of this constitutional challenge.

(1957), this Court noted:

Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Hawaii's effort to still such voices in the medium where such speech matters most -- at the ballot box -- is inconsistent with First Amendment neutrality principles and Hawaii must come forward with very powerful reasons to justify its policy.

II. THE NINTH CIRCUIT MISAPPLIED THE STANDARDS OF JUDICIAL SCRUTINY URGED BY THIS COURT IN *ANDERSON* v. *CELEBREZZE*

In *Anderson v. Celebrezze*, 460 U.S. 780, this Court articulated a broad and flexible analysis for dealing with cases involving the constitutional right of electoral participation.²³ As summarized in *Anderson*, a court called up-

²³ Prior to *Anderson*, this Court had applied a variety of seemingly different analytic standards in reviewing statutes and policies that burdened rights of electoral participation. Compare, e.g., *Dunn v. Blumstein*, 405 U.S. at 342, with *Bullock v. Carter*, 405 U.S. 134, 144 (1972), with *Clements v. Fashing*, 457 U.S. 957, 964 (1982), and with *Mandel v. Bradley*, 432 U.S. 173, 178 (1977).

The *Anderson* Court expressed dissatisfaction with "litmus-paper" (continued...)

on to review a statute or policy restricting electoral participation,

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789.

Nothing in this flexible analytic approach suggests that the *Anderson* Court intended to abandon more than two decades of doctrinal development that preceded it. During that time, this Court had repeatedly subjected to heightened judicial scrutiny laws that selectively distributed the fundamental right to vote, e.g., *Carrington v. Rash*, 380 U.S. 89 (1965); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330, or laws that substantially burdened rights of political expression and association. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976). Where state laws could not survive

²³ (...continued)

tests. 480 U.S. at 789. See also Justice Stevens' concurring opinion in *Eu*, 489 U.S. at 233, and Justice Blackmun's concurring opinion in *Illinois Board of Elections*, 440 U.S. at 183-85 (1979). Accordingly, in *Anderson*, the Court articulated a flexible analysis that attempted to reconcile the disparate standards it had previously employed.

such scrutiny, they were found unconstitutional.

The *Anderson* analysis continues to allow for the application of heightened judicial scrutiny in appropriate cases. Indeed, the initial inquiry contemplated by *Anderson* into the "character and magnitude of the asserted [constitutional] injury" is designed to determine the appropriate standard for the particular case. Where a law is found to burden rights of political participation in a direct or substantial manner, it must satisfy an "exacting" or "heightened" level of judicial scrutiny. A court called upon to review such a law must demand a genuinely close fit between that law and the interests the law purports to advance. It must demand that the statute -- or, in this case, the policy in question -- is "narrowly tailored" in the pursuit of "compelling governmental interests." This point was made clear in recent post-*Anderson* cases such as *Tashjian*, 479 U.S. 208 and *Eu*, 489 U.S. 214 and, most recently, in *Norman v. Reed*, ___ U.S. ___, 60 U.S.L.W. 4075 (Jan. 14, 1992).

In *Tashjian*, this Court reviewed the constitutionality of a Connecticut statute that permitted only party members to vote in the primary elections held by the major political parties. The Republican Party of Connecticut challenged this statutory restriction claiming that the statute unconstitutionally abridged the party's rights of political association. In entertaining this challenge, the Court initially applied the *Anderson v. Celebrezze* standard. Upon finding that the statute burdened "the party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action," *Tashjian*, 479 U.S. at 216, the Court applied heightened scrutiny in rejecting the state's claim that its statute was "a narrowly tailored regulation which advance[d] the state's compelling interests" *Id.* at 217.

Similarly, in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, this Court reviewed the

constitutionality of a California law that prohibited the governing bodies of political parties from endorsing specific candidates in primary contests. In evaluating this statute, the Court again looked first to the *Anderson* standard and asked "whether the statute burden[ed] rights protected by the First and Fourteenth Amendments." *Id.* at 222. The *Eu* Court went on to observe that,

[i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest [citing *Tashjian* and other cases] and is narrowly tailored to serve that interest. [citations omitted]

Id. Finding that the statute could not satisfy this standard of judicial review, the Court held the California restriction unconstitutional.

In *Norman v. Reed*, 60 U.S.L.W. 4075, this Court reviewed the constitutionality of a statutory scheme in Illinois that had been interpreted by the Illinois Supreme Court to prevent a new political party from running a slate of candidates in Cook County. In holding that the new party had been unconstitutionally excluded from the ballot, this Court again looked to the standard articulated in *Anderson* and observed that the First and Fourteenth Amendments²⁴ protect "the constitutional interest

²⁴ The early constitutional right to vote cases such as *Reynolds*, *Carlington*, *Kramer* and *Dunn* looked principally to the Equal Protection Clause of the Fourteenth Amendment as the textual source for the emerging doctrine. Subsequent cases recognized the important expressive and associational aspects of electoral participation and began looking to the First Amendment as a textual source of constitutional protection in this area. See, e.g., *Williams v. Rhodes*, 393 U.S. at 34 (Justice Douglas, concurring), and at 41 (Justice Harlan concurring); *Anderson*, 460 U.S. at 786 n.7. In *Norman*, this Court explicitly (continued...)

of like-minded voters to gather in pursuit of common political ends thus enlarging the opportunities of all voters to express their own political preferences." 60 U.S.L.W. at 4077. The Court went on to address the burden placed on a state that chooses to curtail this constitutional interest. Writing for the Court, Justice Souter observed:

To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation [citation omitted] and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.

Id.

The broad approach of *Anderson* and the more specific standards of *Tashjian*, *Eu* and *Norman* are equally applicable here. As discussed above, the Hawaii policy at issue seriously burdens the expressive and participatory aspects of the constitutional right to vote.²⁵ The "character and magnitude" of these constitutional in-

²⁴ (...continued)

grounded its decision in the First Amendment (as incorporated by the Fourteenth Amendment) and did not "engage in a separate Equal Protection Clause analysis." *Norman v. Reed*, 60 U.S.L.W. at 4077 n.8. At the same time, the *Norman* Court recognized the continuing validity of its earlier equal protection decisions. *Id.*

²⁵ In *Wooley*, this Court subjected New Hampshire's attempt to compel ideological adherence among its motorists to the requirements of heightened judicial scrutiny. 430 U.S. at 716. In *Simon & Schuster*, this Court subjected New York's violation of "neutrality" principles and its content-based discrimination of expression to the requirements of heightened scrutiny. 60 U.S.L.W. at 4032. A similar standard of review is applicable here.

juries are sufficient to require that Hawaii demonstrate that its absolute prohibition of write-in voting can survive heightened judicial scrutiny. The state must demonstrate that its policy is narrowly drawn to advance interests of compelling importance. That showing cannot be made.

III. HAWAII'S POLICY CANNOT SURVIVE SERIOUS CONSTITUTIONAL SCRUTINY

Hawaii argues that its write-in ban promotes "political stability" in two ways: by preventing "inter-party raiding;" and by preventing "sore loser" candidacies. In neither instance, however, is Hawaii able to show that a total prohibition against write-in voting is "necessary" to address these concerns.

This is the case with respect to "inter-party raiding" for two reasons. First, "inter-party raiding" is a concern that is limited to primary elections.²⁶ "Raiding" is never an issue in general elections. Therefore, Hawaii's total prohibition against write-in voting in general elections as well as in primary elections cannot be justified out of a concern for "inter-party raiding." Second, Hawaii has made clear that it does not regard "raiding" as a serious problem by permitting "open" primaries.²⁷ Where, as here, the state permits any voter to vote in any party's primary election it cannot then turn around and seriously

²⁶ "Inter-party raiding" is "the organized switching of blocks of votes from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S. at 788, n.9. This Court noted in *Anderson* that the phenomenon of "inter-party raiding" is "applicable only to party primaries." *Id.* at 801, n.29.

²⁷ In Hawaii's open primary, all registered voters may choose in which party to vote. Haw. Rev. Stat. §12-31. (Op.Cert.App. 45a-46a). For a description of the different types of "open" and "closed" primaries, see *Tashjian*, 479 U.S. at 222, n.11 (1986).

claim that a restriction on write-in voting is "necessary" to prevent "raiding."

Similarly, Hawaii's total prohibition against write-in ballots cannot be justified upon the claim that such a restriction is necessary to prevent candidates who lose primary elections -- so called "sore loser" candidates -- from subsequently attaining office as write-in candidates. This interest can be achieved with more "narrowly tailored" legislation. Hawaii's attempt to reach "sore losers" by barring all write-in voting even in elections that do not involve "sore losers" is simply too unfocused. It reaches far more broadly than is necessary to satisfy whatever interest the state has in preventing "sore losers" from attaining public office. *Cf. Storer*, 415 U.S. at 735.

The claim that Hawaii's prohibition is necessary to ensure an informed electorate is also unpersuasive. Again, it is unlikely in the extreme that a voter will go to the trouble to execute a write-in ballot for a candidate that he or she knows little or nothing about. Seen in these terms, this justification for Hawaii's prohibition against write-in voting is "highly paternalistic," just as this Court regarded California's ban on primary endorsements by political parties to be paternalistic when the state argued that such a prohibition was necessary to permit voters to make wise decisions unencumbered by the views of political parties. *Eu*, 489 U.S. at 223, 228.

Finally, Hawaii's interest in protecting the "internal structure of its election laws" -- by protecting primary victors who are running unopposed from being required to mount a campaign and to run in the general election -- cannot serve as a basis for Hawaii's total prohibition against write-in ballots. Again, Hawaii's total ban on write-in voting reaches far too broadly. It is not confined to those instances where a candidate emerges out of the primary process and is entitled by statute or con-

stitutional provision to run unopposed.²⁸ A broad and blanket prohibition against all write-in voting that extends well beyond the specific situations where unopposed candidates emerge from the primary process cannot be justified here.²⁹

Moreover, if, under Hawaii law, primary victors emerge from the primary process unopposed and succeed to office without running in the general election, Hawaii has effectively converted the primary election into the only electoral contest for the public office, in question. In this circumstance, it is all the more important to permit citizens to submit write-in ballots in these dispositive primary elections.

For all of these reasons, the Ninth Circuit seriously misapplied the *Anderson* analysis when it upheld Hawaii's prohibition against write-in voting upon a casual acceptance of the state's proffered justifications for its restriction. Hawaii's total prohibition against write-in voting is neither "necessary" nor "narrowly tailored" to

²⁸ Hawaii law permits an unopposed primary victor to be automatically designated an office-holder without being required to run in the general election only in connection with state legislative contests (Hawaii Const. art. III, §4) and with elections to county office (Haw. Rev. Stat. §12-41). Section 12-42 (Op.Cert.App. 47a) of the Hawaii Revised Statutes also permits the automatic designation of primary victors in connection with special elections.

Thus, with the exception of special elections, this mechanism only applies in elections to the state legislature and in elections for county office. It does not apply at all to federal elections, gubernatorial elections or elections to the Board of Education. (See Respondent's Brief in Opposition at 24 n.14).

²⁹ Petitioner maintains serious reservations with respect to the legitimacy of the practice of automatically designating an unopposed primary victor as an officeholder without requiring that candidate to run in the general election. That practice is not challenged directly in this case. Its legitimacy is, however, implicated to the degree that Hawaii invokes this practice as justification for its ban on write-in voting.

the advancement of any of its proffered justifications. The proper application of constitutional analysis -- as it has been articulated by this Court most recently in *Tashjian*, *Eu*, and *Norman* -- supports entirely the claim that Hawaii's total prohibition against all write-in voting cannot and should not be sustained.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

Arthur N. Eisenberg
(Counsel of Record)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Mary Blaine Johnston
90 Central Avenue
Wailuku, Maui, Hawaii 96793
(808) 244-8750

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

Paul W. Kahn
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4846

Lawrence G. Sager
Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6100

Alan B. Burdick
920 Mililani Street, Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

Dated: January 23, 1992

(11)
No. 91-535

Supreme Court, U.S.

FILED

MAR 2 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii;
and BENJAMIN CAYETANO, in his capacity as
Lieutenant Governor of the State of Hawaii,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF

WARREN PRICE, III
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
GIRARD D. LAU
Deputy Attorneys General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6944
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, despite the opportunities voters in Hawaii enjoy to cast, and have counted and published, votes for their preferred candidates, Hawaii's election laws are void under the First and Fourteenth amendments because write-in votes may not be cast at Hawaii's elections?
2. Whether the election booth in Hawaii is an unlimited public forum such that, whether or not Hawaii would seat a write-in candidate who garnered the support of a plurality of voters, the Constitution requires Hawaii to allow write-in "votes" without restriction at both its primary and general elections, and to count and publish such "votes"?

PARTIES BEFORE THIS COURT

Respondent Morris Takushi is and at all relevant times has been the Director of Elections of the State of Hawaii, and, under the direction of the Lieutenant Governor of Hawaii, is by law (Haw. Rev. Stat. § 11-5 (1985)), charged with the preparation of the ballots for Hawaii elections. Respondent John Waihee was, in 1986, when D.C. Civil No. 86-0582 was filed in the United States District Court for the District of Hawaii, the Lieutenant Governor of Hawaii and the State of Hawaii's chief elections officer. *See* Haw. Rev. Stat. § 11-2 (1985). Respondent Waihee was elected Governor in 1986, and was succeeded in office by Respondent Benjamin J. Cayetano. Respondent Cayetano, along with Respondent Takushi, was named as a defendant in No. 88-0365, and was re-elected to office in November, 1990. All Respondents were named in the courts below solely in their official capacities in this federal suit for equitable relief, and, therefore, so appear in this Court in those capacities.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BEFORE THIS COURT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
I. How the Hawaii Electoral System Works	2
A. Hawaii's Opportunities for Electoral Participation	3
1. The Party-Petition Route	3
2. The Established Party Route	6
3. The Non-Partisan Primary Route	7
B. Hawaii's Prohibition on Write-in Voting	8
1. What the Prohibition Does	10
a. The Interest in Protecting the Primary System	10
i. The Interest in Confining Intra-Party Feuds	11
ii. The Interest in Preventing "Party Raiding"	12
b. The Interest in Finality in Runaway Campaigns	12

TABLE OF CONTENTS – Continued

	Page
c. Procedural Interests Underlying the Ban: Informing the Electorate, Promptly Qualifying the Candidates, and Eliminating Potential for Fraud	13
i. The Interest in Informed Voting	13
ii. The Interest in Preventing Vacancies.....	14
iii. The Interest in Combating Electoral Corruption	14
II. The Litigation Below	15
SUMMARY OF ARGUMENT.....	19
ARGUMENT	22
I. The Ninth Circuit Properly Reversed the District Court's Wholesale Invalidation of Hawaii's Election Law; That Injunction Had, as a Federal Constitutional Matter, Usurped State Legislative Authority over the Electoral Process in Unprecedented Fashion.....	22
A. As the Court of Appeals Recognized, This Court's Principles Demand Deference to the State's Basic Decision as to How to Structure Elections	23
B. The Court of Appeals Properly Treated this Case as One Implicating the Generous Deference Owed to the States as to the Decision How to Structure Access to the Ballot.....	26
C. The Court of Appeals Properly Held that Hawaii's Ban on Write-in Voting, When Viewed in the Context of the Electoral System as a Whole, Imposes only Minimal Burdens on Petitioner's Opportunity to Exercise a Meaningful and Effective Vote.....	28

TABLE OF CONTENTS – Continued

	Page
1. The Ninth Circuit Properly Held that Hawaii's Ballot Access Laws Provide Broad Opportunity, and Impose only Minimal Burdens on First Amendment Interests.....	29
2. The Ninth Circuit's Judgment Properly Reflects the Conclusion that Write-in Voting is, so far as the Constitution is Concerned, at Most only a Remedy for Otherwise Unconstitutional Ballot Access Laws.....	34
3. Petitioner's Arguments Relating to the Burden of the Write-in Voting Ban, Many of Which Were Not Raised Below, Would Nullify Any Discretion in a State To Regulate Elections.....	37
D. Under Any Standard Applicable to Hawaii's Election Laws, Hawaii's Prohibition on Write-in Voting is Appropriately Backed by Long-Recognized Compelling Interests.....	41
1. The Interest in Protecting the Electoral Process from Unrestrained Factionalism and Frivolous Candidacies at the General Election.....	41
2. The Interest in Protecting the Political Parties from Party Raiding.....	43
3. The Interest in Protecting the Primary Mandate and in Eliminating Uncontested Elections.....	43
4. The Interest in Voter Education, Protecting Against Vacancies, and Enforcing Nomination Requirements	44

TABLE OF CONTENTS – Continued

	Page
5. The Interest in Combating Fraud	46
E. Affirmance is Particularly Appropriate in that the Court of Appeals was Faced with a Purely Facial Federal Challenge.....	46
II. Petitioner Cannot Obtain Reversal Upon a Public Forum Theory of "Freedom of Expression" in the Voting Booth, Unhinged from the Right to Cast a "Vote."	47
CONCLUSION	50

TABLE OF AUTHORITIES

	Page
CASES:	
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	4, 33, 34, 37, 40
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	<i>passim</i>
<i>Barr v. Cardell</i> , 173 Iowa 18, 155 N.W. 312 (1915)	23
<i>Bender v. Williamsport Area School District</i> , 475 U.S. 534 (1986)	41
<i>Board of Estimate v. Morris</i> , 489 U.S. 688 (1989)	39
<i>Bradley v. Mandel</i> , 449 F. Supp. 983 (D. Md. 1978)	5
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985)	47
<i>Burdick v. Takushi</i> , 846 F.2d 547 (9th Cir. 1988)	16
<i>Burdick v. Takushi</i> , 70 Haw. 498, 776 P.2d 523 (1989) ..	8, 16
<i>Burdick v. Takushi</i> , 737 F. Supp. 582 (D. Haw. 1990) .	16, 17
<i>Burdick v. Takushi</i> , 937 F.2d 415 (9th Cir. 1991)	17
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	38
<i>Canaan v. Abdelnour</i> , 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985)	15, 23, 43
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	32
<i>Chamberlin v. Wood</i> , 15 S.D. 216, 88 N.W. 109 (1901)	24
<i>Chimento v. Stark</i> , 353 F. Supp. 1211 (D.N.H.), <i>aff'd</i> , 414 U.S. 802 (1973)	39, 45
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 486 U.S. 750 (1988)	33
<i>Cornelius v. NAACP Legal Defense and Educational Fund</i> , 473 U.S. 793 (1985)	22, 49
<i>Deakins v. Monaghan</i> , 484 U.S. 193 (1988)	28

TABLE OF AUTHORITIES - Continued

	Page
<i>Delta Airlines v. August</i> , 450 U.S. 346 (1981)	38
<i>Democratic Party v. Wisconsin</i> , 450 U.S. 107 (1981)	45
<i>Devine v. Wonderlich</i> , 268 N.W.2d 620 (Iowa 1978)	14
<i>Dixon v. Maryland State Board</i> , 878 F.2d 776 (4th Cir. 1989)	18, 19, 45
<i>Erum v. Cayetano</i> , 881 F.2d 689 (9th Cir. 1989)	31, 33
<i>Eu v. San Francisco County Democratic Committee</i> , 489 U.S. 214 (1989)	41, 44
<i>FDIC v. Mallen</i> , 486 U.S. 230 (1988)	33
<i>Federated Department Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981)	34
<i>Frisby v. Schultz</i> , 487 U.S. 474 (1988)	33
<i>Gebelein v. Nashold</i> , 406 A.2d 279 (Del. Ch. 1979)	44
<i>Georges v. Carney</i> , 691 F.2d 297 (7th Cir. 1982) ..	22, 40, 49
<i>Gregory v. Ashcroft</i> , 111 S. Ct. 2395 (1991)	10, 19, 24
<i>Hall v. Simcox</i> , 766 F.2d 1171 (7th Cir.), cert. denied, 474 U.S. 1006 (1985)	19, 36
<i>Harden v. Board of Elections</i> , 74 N.Y. 2d 796, 544 N.E.2d 605, 545 N.Y.S. 2d 686 (1989)	19
<i>Hayes v. Gill</i> , 52 Haw. 251, 472 P.2d 872 (1973)	14
<i>Holstein v. Young</i> , 10 Haw. 216 (1896)	9, 15
<i>Hustace v. Doi</i> , 60 Haw. 282, 588 P.2d 915 (1978)	8
<i>Jackson v. Norris</i> , 173 Md. 579, 195 A. 576 (1937) .	23, 24
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	7, 20, 26, 37
<i>Jenson v. Turner</i> , 40 Haw. 604 (1954)	10, 24, 40
<i>Joyner v. Moffard</i> , 706 F.2d 1523 (9th Cir. 1983)	39
<i>Lefkowitz v. Cunningham</i> , 431 U.S. 801 (1977)	40

TABLE OF AUTHORITIES - Continued

	Page
<i>Legislature of California v. Eu</i> , 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991)	19, 45
<i>Littlejohn v. People ex rel. Desch</i> , 52 Colo. 217, 121 P. 159 (1912)	23
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	36, 37
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	34
<i>Mayor and Board of Alderman of City of Jackson v.</i> <i>State ex rel. Howie</i> , 102 Miss. 663, 59 So. 873 (1912)	23, 24
<i>McClain v. Meier</i> , 851 F.2d 1045 (8th Cir. 1988). 4, 18, 36	
<i>McKenzie v. Boykin</i> , 111 Miss. 256, 71 So. 382 (1916)	24
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	passim
<i>New York State Club Ass'n v. City of New York</i> , 487 U.S. 1 (1988)	47
<i>Norman v. Reed</i> , 112 S. Ct. 698 (1992)	20, 25, 29, 32, 33, 37
<i>Patterson v. Hanley</i> , 136 Cal. 265, 68 P. 821 (1902)	15
<i>Pendleton v. District of Columbia Board</i> , 433 A.2d 1102 (1981)	14
<i>Pennhurst State School & Hospital v. Halderman</i> , 465 U.S. 89 (1984)	24
<i>Peralta v. Heights Medical Center, Inc.</i> , 485 U.S. 80 (1988)	30
<i>Rainbow Coalition v. Oklahoma State Elections Board</i> , 844 F.2d 740 (10th Cir. 1988)	18, 19, 36
<i>Renne v. Geary</i> , 111 S. Ct. 2331 (1991)	21, 47
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	39
<i>Rodriguez v. Popular Democratic Party</i> , 457 U.S. 1 (1982)	21, 24, 39, 44
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	12
<i>Rust v. Sullivan</i> , 111 S. Ct. 1759 (1991)	48, 49

TABLE OF AUTHORITIES - Continued

	Page
<i>Simon & Schuster v. New York Victims Board</i> , 112 S. Ct. 501 (1991)	41
<i>Socialist Labor Party v. Rhodes</i> , 290 F. Supp. 983 (S.D. Ohio), <i>aff'd in part and modified in part</i> , 393 U.S. 23 (1968)	35
<i>Socialist Workers Party v. Munro</i> , 765 F. 2d 1417 (9th Cir. 1985)	37
<i>State Administrative Board v. Calvert</i> , 272 Md. 659, 327 A.2d 290 (1974), <i>cert. denied</i> , 419 U.S. 1110 (1975)	12
<i>Stevenson v. State Board of Elections</i> , 796 F.2d 1176 (7th Cir. 1986)	21, 33, 42, 47
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	<i>passim</i>
<i>Strmaglia v. Jenkins</i> , 9 Ill. App. 3d 703, 292 N.E.2d 912 (1973)	14
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	3, 21, 41, 43
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	48
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	21
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	21, 47
<i>United States v. Kokinda</i> , 110 S. Ct. 3115 (1991)	22, 49
<i>United States v. Gradwell</i> , 243 U.S. 476 (1916)	23
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	43, 46, 48
<i>Weldon v. Sanders</i> , 99 N.M. 160, 655 P.2d 1004 (1982)	14
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	40
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	20, 21, 26, 33, 35, 36
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	40

TABLE OF AUTHORITIES - Continued

	Page
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1896)	27, 48
<i>Zielasko v. Ohio</i> , 873 F.2d 957 (6th Cir. 1989)	18
STATUTES:	
Ala. Code § 17-7-1(a)(3) (1987)	3
Alaska Stat. § 15.25.070 (1988)	12
Alaska Stat. § 15.25.160 (1988)	3
Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989)	13
Ariz. Rev. Stat. Ann. § 16.341.E (Supp. 1991)	3
Ark. Stat. Ann. § 7-5-205 (Supp. 1989)	13
Cal. Elec. Code § 6831 (West 1977)	3
Cal. Elec. Code § 7300 (West 1977 & 1990)	13
Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989)	13
Conn. Gen. Stat. § 9-373(a) (1989)	13
Conn. Gen. Stat. Ann. § 9-453d (West 1989)	3
Del. Code Ann. tit. 15, § 3002(b) (1981)	3
Fla. Stat. Ann. § 101.011(6) (1989)	12
Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991)	13
Fla. Stat. Ann. § 9-103.021(3) (Supp. 1992)	3
Ga. Code Ann. § 21-2-170 (1990)	3
Ga. Code Ann. § 34A-915 (Harrison Supp. 1988)	13
Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988)	12

TABLE OF AUTHORITIES – Continued

	Page
Hawaii Revised Statutes, Chapter 11 (1985)	1
Hawaii Revised Statutes, § 11-61 (Supp. 1991).....	7
Hawaii Revised Statutes, § 11-61(b)(1) (Supp. 1991).....	7
Hawaii Revised Statutes, § 11-61(b)(2) (Supp. 1991).....	7
Hawaii Revised Statutes, § 11-61(b)(3) (Supp. 1991).....	7
Hawaii Revised Statutes, § 11-61(b)(4) (Supp. 1991).....	7
Hawaii Revised Statutes, § 11-61(b)(5) (Supp. 1991).....	7
Hawaii Revised Statutes, § 11-62(a) (Supp. 1991) ...	4, 7
Hawaii Revised Statutes, § 11-62(a)(3) (Supp. 1991).....	3, 4
Hawaii Revised Statutes, § 11-62(a)(4) (Supp. 1991).....	5
Hawaii Revised Statutes, § 11-62(d) (Supp. 1991)	7
Hawaii Revised Statutes, § 11-63 (Supp. 1991).....	5, 6
Hawaii Revised Statutes, § 11-64 (1985)	5
Hawaii Revised Statutes, § 11-113 (1985)	6, 35
Hawaii Revised Statutes, § 11-117 (1985)	13, 44
Hawaii Revised Statutes, § 11-118 (1985)	13, 44
Hawaii Revised Statutes, Chapter 12 (1985)	1
Hawaii Revised Statutes, § 12-2.5 (1985).....	4

TABLE OF AUTHORITIES – Continued

	Page
Hawaii Revised Statutes, § 12-3 (1985)	5, 7
Hawaii Revised Statutes, § 12-3(7) (1985).....	12, 43
Hawaii Revised Statutes, § 12-4 (1985)	7
Hawaii Revised Statutes, § 12-5 (1985)	4, 7
Hawaii Revised Statutes, § 12-6 (1985)	4, 7
Hawaii Revised Statutes, § 12-7 (1985)	5, 7
Hawaii Revised Statutes, § 12-8 (1985)	12
Hawaii Revised Statutes, § 12-21 (1985)	5
Hawaii Revised Statutes, § 12-22 (1985)	7
Hawaii Revised Statutes, § 12-41 (1985)	5, 8, 13, 31
Hawaii Revised Statutes, Chapter 16 (1985)	1
Hawaii Revised Statutes, Chapter 17 (1985)	1
Hawaii Revised Statutes, § 17-3 (1985 & Supp. 1991).....	13
Hawaii Revised Statutes, § 17-4 (1985 & Supp. 1991).....	13
Hawaii Revised Statutes, § 17-5 (1985 & Supp. 1991).....	13
Rev. L. Haw. § 237 (1945), <i>recodified at</i> HRS § 16-26(1) (1985).....	10
Idaho Code § 34-702A (Supp. 1989)	13
Ill. Ann. Stat. ch. 46, ¶17-16.1 (1991)	11
Ind. Code Ann. § 3-8-2.5(e) (Burns Supp. 1991).....	12
Ind. Code Ann. § 3-8-6-3 (Burns 1988)	4

TABLE OF AUTHORITIES - Continued

	Page
Kan. Stat. Ann. §§ 25-213.....	12
Ky. Rev. Stat. § 117.265(3).....	11
La. Rev. Stat. Ann. § 441 (West 1979)	4
Mass. Gen. Laws Ann. ch. 54, § 78A (West 1991)	13
Md. Elec. Code Ann. art. 33, § 4B-1(h) (1990)	4
Md. Ann. Code, art. 33, § 5-3(f) (1986).....	12
Md. Elec. Code § 4D-1 (Supp. 1989)	13
Mich. Comp. Laws Ann. § 168.590b.(2) (Supp. 1991).....	3
Minn. Stat. § 204B.36(2) (1988).....	12
Mont. Code Ann. § 13-10-211 (1989)	14
Mo. Rev. Stat. § 115.321.3 (Supp. 1992).....	3
Mo. Rev. Stat. § 115.453(4) (1986)	14
Neb. Rev. Stat. § 32-428 (1988).....	11
Neb. Rev. Stat. § 32-428.10(2) (1989).....	14
N.C. Gen. Stat. § 163-122(a)(1) (1991).....	4
N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991)	14
N.C. Gen. Stat. § 163-151(6)(e) (1987).....	12
N.D. Cent. Code § 16.1-12-02.2 (Supp. 1991).....	14
Nev. Rev. Stat. § 24-293.200.1 (1991).....	4
Nev. Rev. Stat. § 293.270(2) (1991).....	11
N.M. Stat. Ann. § 1-8-51C (1991).....	4
N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991)	14
N.M. Stat. Ann. § 1-12-19.1E (Supp. 1985).....	11

TABLE OF AUTHORITIES - Continued

	Page
N.Y. Elec. Law § 6-154 (McKinney 1978 & Supp. 1992).....	14
Ohio Rev. Code Ann. § 3513.04 (1989)	11
Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991)	14
Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989).....	11
Or. Rev. Stat. § 249.007 (Supp. 1991)	14
Or. Rev. Stat. § 249.740(a) (Supp. 1991).....	4
Pa. Stat. Ann. tit. 25, § 2911(b) (Supp. 1991)	4
S.D. Codified Laws Ann. § 12-7-1 (1982)	3
S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990).....	11
Tex. Elec. Code Ann. § 142.007(1) (Vernon 1986).....	3
Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991).....	14
Texas Code Ann. § 146.002 (Vernon 1986)	11
Texas Code Ann. § 172.112 (Vernon 1986)	12
Utah Code Ann. § 20-7-20 (1984 & Supp. 1991)	14
Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986)	11
Wash. Rev. Code Ann. § 29.04.180 (1965 & Supp. 1991).....	14
W.Va. Code § 3-6-5 (1978)	12
Wis. Stat. § 8.185(2) (1986 & Supp. 1991).....	14
Wyo. Stat. § 22-5-304 (Supp. 1991)	4
Wis. Stat. § 8.16(2) (1986 & Supp. 1991).....	14

TABLE OF AUTHORITIES - Continued

	Page
Wis. Stat. § 8.17(3)(a) (1987-88).....	12
Act of January 3, 1893, Ch. 79, Stat. L. Liliuokalani 229 (1892).....	1
Act of November 14, 1890, Haw. Sess. L. 191, Ch. 86, § 57, (1890).....	9
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. I, § 4.....	1, 10, 24
U.S. Const. art. II, § 1.....	1, 10
U.S. Const. amend. X.....	1
Const. Kamehameha III (1840), reprinted in <i>Funda- mental Law of Hawaii</i> 6 (1904 ed.).....	2
Hawaii Const., art II, § 4 (1978).....	43
Hawaii Const., art III, § 4 (Supp. 1991).....	1, 13
LEGISLATIVE HISTORY:	
H. Haw. Stand. Comm. Rep. No. 762-86, reprinted in 1986 Haw. H.J. 3170.....	7
OTHER AUTHORITIES:	
L. E. Fredman, <i>The Australian Ballot: The Story of an American Reform</i> (1968).....	9, 15
Lt. Governor of Hawaii, <i>Results of Votes Cast: Pri- mary Election, Sept. 22, 1984</i>	32

TABLE OF AUTHORITIES - Continued

	Page
Lt. Governor of Hawaii, <i>Results of Votes Cast: Pri- mary Election, Sept. 20, 1986</i>	32
Lt. Governor of Hawaii, <i>Results of Votes Cast: Pri- mary Election, Sept. 17, 1988</i>	32
<i>Laws of the Prov. Gov't of the Hawaiian Islands</i> iii (1894).....	9

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hawaii election law (Chapters 11, 12, 16, and 17, Hawaii Revised Statutes ("HRS")), as now in force, together with Article III, § 4 of the Hawaii Constitution (Supp. 1991), which give rise to, and are enforced by, the prohibition on write-in voting in Hawaii, are reprinted in Appendix ("App.") A to this Brief. The Act of January 3, 1893, Ch. 79, *Stat. L. Lil-iuokalani* 229 (1892), the original statute in Hawaii prohibiting write-in voting, is printed in App. B. Article I, § 4, clause 1 of, Article II, § 1, clause 2 of, and the Tenth Amendment to the Constitution are printed in App. C.

STATEMENT OF THE CASE

The issue in this case is whether the two-stage process by which Hawaii has elected its political leaders for decades is facially void under the United States Constitution merely because Hawaii does not allow the casting of "write-in" votes.

Answering in the negative, the panel below reversed an unprecedented federal injunction directing Hawaii to permit write-in votes to be cast, and then to count and publish all such votes, without limit. Applied generally, the injunction would have nullified the laws of more than thirty States that, to varying degrees, limit voter choice on election day, and, hence, do not allow the unlimited write-in voting sought here.

In reversing the District Court's novel and intrusive decree, the Ninth Circuit remanded Petitioner Alan Burdick to the generous nomination procedures Hawaii has provided to voters who seek to cast votes for preferred candidates.

Under those procedures, voters can place the name of any eligible, willing candidate on the primary ballot by a petition, filed the last week in July, signed by 15 registered voters (25 registered voters for statewide or federal elective office).

To advance to the general election, candidates must win a party primary, or, if they are a non-partisan (independent) candidate running without any party status, win a certain number of primary votes. For candidates who choose the independent route, Hawaii has thus erected a vehicle for triggering ballot access "that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). However, because of procedures available to independents and new parties that guarantee placement on the November ballot by the filing of signatures in numbers equal to 1 per cent of the registered vote in the last election, our election laws are even more liberal than Washington's, which were upheld in *Munro*. The issue here is thus whether, in light of these opportunities to cast an effective vote, the Ninth Circuit properly rejected Alan Burdick's facial attack on Hawaii's ban on write-in votes, and, relatedly, refused to compel Hawaii to publish a proposed write-in "protest" that "none of the above" candidates merited support on election day.

I. How the Hawaii Electoral System Works.

Like numerous States,¹ Hawaii believes a primary "is 'an integral part of the entire election process'" that acts

¹ Representative government began in Hawaii with the commencement of Hawaii's constitutional monarchy in 1840, which guaranteed a popularly elected House of Representatives, with a veto over proposed legislation. See Const. Kamehameha III (1840), reprinted in *Fundamental Law of Hawaii* 6 (1904) ed.).

" 'to winnow out and finally reject all but the chosen candidates.' " See *Munro*, 479 U.S. at 196. Under this process, write-in votes are not permitted either at the primary or the general election. Instead, Hawaii law provides, in its "open primary" system,² three distinct, broad, avenues by which citizens may turn support for preferred candidates into a vote on election day.

A. Hawaii's Opportunities for Electoral Participation

1. The Party-Petition Route.

The presumptive avenue for assuring that votes for a candidate will be counted at the November election is the party-petition route. HRS § 11-62 (Supp. 1991). A party may be formed for "any group of persons" garnering "signatures of currently registered voters" equal to not less than one percent of the total registered voters of the State as of the last preceding general election. *Id.* §§ 11-62(a)(3). At least 20 other States require as many on a percentage basis.³ Petition signers need not be members

² See *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 223 n.11 (1986) (Hawaii is one of 9 States "in which all registered voters may choose in which party primary to vote").

³ Alabama (Ala. Code § 17-7-1(a)(3) (1987)); Alaska (Alaska Stat. § 15.25.160 (1988)); Arizona (Ariz. Rev. Stat. Ann. § 16.341.E (Supp. 1991)); California (Cal. Elec. Code § 6831 (West 1977)); Connecticut (Conn. Gen. Stat. Ann. § 9-453d (West 1989)); Delaware (Del. Code Ann. tit. 15, § 3002(b) (1981)); Florida (Fla. Stat. Ann. § 9-103.021(3) (Supp. 1992)); Georgia (Ga. Code Ann. §§ 21-2-170, 34-1010 (1990)); Michigan (Mich. Comp. Laws Ann. § 168.590b.(2) (Supp. 1991)); Missouri (Mo. Ann. Stat. § 115.321.3 (Supp. 1992)); South Dakota (S.D. Codified Laws Ann. § 12-7-1 (1982)); and Texas (Tex. Elec. Code Ann. § 142.007(1) (Vernon 1986)), have a 1% rule. Indiana

(Continued on following page)

of the "group of persons desiring to qualify" (cf. HRS § 11-62(a) with *id.* § 11-62(a)(3)), and as few as two people may start a party. A voter may sign multiple petitions, and still vote in the primary for any other party's primary candidates, or for nonpartisans.⁴

The party filing deadline, 150 days before the primary, occurs in mid- to late April. In late July, sixty days before the primary, those who seek to run a candidate in a party primary must file nomination papers containing 25 signatures of registered voters for statewide or federal office (15 in state legislative and county races). See HRS §§ 12-2.5, 12-5, 12-6. A nominating voter need not pledge support for a candidate, nor be a party member. *Id.* §§ 12-3, 12-4. Candidates must certify they "will qualify

(Continued from previous page)

(Ind. Code Ann. § 3-8-6-3 (Burns 1988)); North Carolina (N.C. Gen. Stat. § 163-122(a)(1) (1991)); and Pennsylvania (Pa. Stat. Ann. tit. 25, § 2911(b) (Supp. 1991)), have a 2% rule. Maryland (Md. Elec. Code Ann. art. 33, § 4B-1(h) (1990)); New Mexico (N.M. Stat. Ann. § 1-8-51C (1991)); Nevada (Nev. Rev. Stat. § 24-293.200.1 (1991)); and Oregon (Or. Rev. Stat. § 249.740(a) (Supp. 1991)), have a 3% rule. Louisiana (La. Rev. Stat. Ann. § 441 (West 1979)); and Wyoming (Wyo. Stat. § 22-5-304 (Supp. 1991)), have a 5% petition requirement. In Hawaii, the 1% rule, in 1986 when these cases began, required 4,189 signatures. See Clerk's Record ("C.R.") 13 in No. 86-0582, J.A. 67; see also attachments to Exh. "T" (C.R. 48). Petitioner also admits that at least six States, including Arkansas, Illinois, Kentucky, New York, North Dakota, Ohio, and South Carolina, as a result of non-percentage rules, require at least that many signatures for statewide contests. App. to Appellees' Ans. Br., Nos. 86-2689, 86-2703 (9th Cir. Apr. 1987) (C.R. 31 in No. 86-0582); see also *McClain v. Meier*, 851 F.2d 1045, 1047 (8th Cir. 1988) (7,000 signatures (1.6% rule)).

⁴ Compare HRS § 11-62(a)(3) (no limit on number of party petitions that may be signed), with *Munro*, 479 U.S. 198-99 (confining voter to a single nominating act); *American Party of Texas v. White*, 415 U.S. 767, 785 n.17 (1974) (same).

under the law for the office," must declare their "residence address[.]" must affirm "[they are] a member of the party" under whose banner they run, and pledge "support" for the state and federal constitutions. *Id.* §§ 12-3, 12-7.

New party candidates are selected at Hawaii's open primary, held the last week in September, and may "campaign among the entire pool of registered voters," *Munro*, 479 U.S. at 197. Unlike the minor parties in Washington at issue in *Munro*, new party candidates need not obtain any minimum number of votes at the primary to advance. The April filing guarantees a new party the right to place its primary winners on the November ballot.

Importantly, the "party petition" avenue is in effect open not only to new and minor parties, but to independent candidates who wish to run free of "a state-wide, on-going organization." Cf. *Storer v. Brown*, 415 U.S. 724, 745 (1974). Thus, while a new-party petition must be accompanied by "names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules," HRS § 11-62(a)(4), the law does not state a party may be disqualified if it has *no* officers, committees, or rules. See HRS, §§ 11-63, 11-64. Likewise, a new party can easily organize around a single candidacy. Thus, if John Smith and a friend wish to form "the John Smith Party," if they obtain the requisite signatures and lawfully nominate Smith, and if Smith is eligible to hold office, Smith will be in the September primary and will advance to the November ballot if anyone votes for him in the primary. *Id.* §§ 12-21, 12-41. If no one else is running, Smith then will be "elected" at the primary.⁵

⁵ Not faced with the "pressure of conducting a petition drive in adverse winter weather," see *Bradley v. Mandel*, 449 F. Supp. 983, 986 (D. Md. 1978), minor parties have fared relatively well in Hawaii, even holding aside Presidential

(Continued on following page)

2. The Established Party Route.

Hawaii, like most States, exempts certain political parties desiring to place candidates' names on the

(Continued from previous page)

elections, as to which there is a special late-filing rule, *see* HRS § 11-113. The 1976-1986 history of third party candidates in non-presidential elections is as follows:

In 1976, Libertarians appeared for United States Senate, and the Second Congressional District; People's Party candidates appeared for United States Senate, the Second Congressional District, State House District 18, Hawaii County Council, and Maui County Council; Independents for Godly Government appeared for both Congressional Districts, State House Districts 5, 8, 11, 13, 22, and 23, Maui County Mayor, Maui County Council, and Kauai County Council. See J.A. 216-220. In 1978, Libertarians appeared for both United States House seats, and Governor/Lieutenant Governor; Aloha Democratic Party candidates did so in races for the First Congressional District, and Governor/Lieutenant Governor. See J.A. 222. In 1980, Libertarians appeared for United States Senate, both United States House seats, State Senate District 6, State House Districts 6 and 25, Maui County Council, and Honolulu Mayor. See J.A. 230-237. In 1982, Libertarians appeared for both United States House seats, State Senate District 22, Honolulu County Council (2 seats), and Kauai County Council; Independent Democrats appeared for the United States Senate, Governor/Lieutenant Governor, State Senate District 12, State House Districts 9, 11, 23, 25, 48, and 49, Maui County Council, and Kauai County Council. See J.A. 244-54. In 1984, Libertarians appeared for both United States House seats, and Honolulu Mayor. See J.A. 258-66. In 1986, Libertarians appeared for both United States House seats. See J.A. 272.

After the 1986 filing deadline, the Legislature amended the election code to allow new parties to avoid petitioning for November ballot placement for a ten year period if they successfully petitioned in three successive elections. *See* HRS § 11-63 (Supp. 1991). The Libertarian Party, in light of this rule, and its past petitioning efforts, is now an established party, and will remain so until 1996, and, potentially, until 2000.

November ballot from petitioning or other requirements. These exemptions are determined by a demonstration of "historically established broad support." *See Jenness v. Fortson*, 403 U.S. 431, 441 (1971). To obtain an exemption, Hawaii requires a showing of ten percent in any preceding state-wide or congressional race, or analogous showings if candidates ran in state legislative races, HRS §§ 11-61(b)(1)-(5). Under HRS § 11-61 and 62, "if a party qualifies through petition for three consecutive elections, it will be deemed a political party for the following ten year period." Haw. H. Stand. Comm. Rep. No. 762-86, reprinted in 1986 Haw. H.J. 3170 (commenting upon HRS § 11-62(d) (Supp. 1991)). *See* App. 58, *infra*. At present, the Democratic, Libertarian, and Republican parties are established parties in Hawaii. *See supra* note 5.

The established party nominees are chosen in the same manner as the nominees of a "new" party. Established party candidates first must properly file and run in their party's primary, and the primary winner advances to the November election ballot, unless Hawaii's runaway primary winner rules render the primary winner the victor at the primary stage. *See infra* pp. 12-13.

3. The Non-Partisan Primary Route.

Hawaii's third route to November ballot position is placement on the non-partisan primary ballot. Non-partisans need not have party sponsorship, but run in a separate primary on primary day. HRS § 12-22. To enter, non-partisans need only meet the minimal petition and filing requirements set forth in HRS §§ 12-3 - 12-7. A truly minimal show of support (15 petition signatures for county and state legislative races and 25 signatures for other races) is needed.

Non-partisans then may advance under HRS § 12-41, which has been interpreted by the Supreme Court of Hawaii as follows:

The candidate of a qualified party may obtain nomination by securing any number of votes, no matter how few, if they constitute a plurality of votes cast for candidates of that party, while a nonpartisan candidate must receive a minimum number of votes [i.e., 10% of the primary vote]. That minimum number, however, can never be more than the number of votes which has been sufficient to nominate a partisan candidate[.]

Hustace v. Doi, 60 Haw. 282, 289-90, 588 P.2d 915, 920 (1978). Eight of 26 nonpartisans who entered primaries between 1976-86 gained November ballot position, many with vote totals much smaller than candidates who lost in the party primaries.⁶

B. Hawaii's Prohibition on Write-in Voting.

Hawaii election law, like that of most States, nonetheless has limits, one of which, as the Supreme Court of Hawaii held in this case,⁷ is a prohibition on "write-in" votes. First intended to redress alleged vote-buying in

⁶ See Exh. "F" at 14, Clerk's Record ("C.R.") 47, No. 86-0582 (D. Haw. Apr. 19, 1990). Between 1976-1986, nonpartisans appeared on the November ballot for U.S. Senate (1976), Maui Council (1976 and 1980), Governor/Lieutenant Governor (1978), Honolulu Mayor (1980), U.S. House (1982), and Honolulu city council (1982). See the returns at J.A. 216, 220, 222, 236, 244, 253.

⁷ *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 523 (1989).

Hawaii's elections in the late 19th century.⁸ Hawaii's strong version of the Australian ballot reform serves many compelling interests.

⁸ Hawaii's early election laws allowed write-in voting, and mandated, on the government-printed ballots, the reservation of "[s]ufficient space" "to permit the erasure of all the names thereon, and the substitution of an equal number therefor." Act of Nov. 15, 1890, Ch. 86, § 57, 1890 Haw. Sess. L. 191, 215. However, as on the mainland, the unregulated ballot led to widespread charges of vote-buying and other sorts of abuse. See generally L.E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968). Thus, on January 3, 1893, Queen Liliuokalani signed into law reforms which prohibited any person "to stand as a candidate for election unless he shall be so requested in writing, signed by not less than twenty-five duly qualified electors of the district in which such election is ordered; which request shall be deposited with the Minister of the Interior not less than twenty-one days before the day of such election [7 days on Oahu]," thus substituting a system of pre-election nominations for the process of write-in nominations on election day. Act of January 3, 1893, Ch. 89, 1888-92 Haw. Sess. L. 229-30, App. 62-65, *infra*. Ultimately, reform came too late to save the Queen, as the monarchy was toppled two weeks later amidst charges she failed to redress the "steadily increasing corruption of electors." Proclamation of the Committee of Public Safety dated Jan. 17, 1893, *Laws of the Prov. Gov't of the Hawaiian Islands* iii (1894), App. 67, *infra*.

As a result of the revolution of 1893, new laws strictly regulated the voting process by providing for the printing of candidates' names, marking a voter's choice with a cross "in the space or spaces provided for such purpose," and the nullification of any ballot containing "any mark or symbol whereby it may be identified, or any mark or symbol contrary to the provisions hereof." See *Holstein v. Young*, 10 Haw. 216, 221 (1896). Given that "the main object of the present system of voting is to secure secrecy of the ballot," *id.* at 222, the law was construed to prohibit any marks other than the cross next to a printed name, and, a fortiori, write-in voting. *Id.*

(Continued on following page)

1. What the Prohibition Does.

Hawaii's ban on write-in voting plays an essential role in defining "the structure of [state] government," see *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991), and the "time, place, and manner" by which Hawaii chooses its representatives to the National government. U.S. Const. art. I, § 4; *id.* art. II, § 1.

a. The Interest in Protecting the Primary System

Hawaii's ban on write-ins makes clear that the primary is "an integral part of the entire election process" that "functions to winnow out and finally reject all but the chosen candidates." *Munro*, 479 U.S. at 196. It does this in two ways. First, by making the primary count, the ban bars the carrying of intra-party feuds into the general election. *Id.* Second, the ban ensures that the primary *can* count, constitutionally, by protecting the associational rights of the parties against strategic voting and "party raiding" by write-in votes.

(Continued from previous page)

In *Jenson v. Turner*, 40 Haw. 604 (1954), the Supreme Court of Hawaii specifically confirmed that provisions of Hawaii law that render void ballots marked "in any way" "contrary to the provisions of" the election law impliedly prohibit write-in voting. See Rev. L. Haw. § 237 (1945), *recodified at* HRS § 16-26(1) (1985). Hawaii election officials and the Hawaii Attorney General thereafter consistently viewed the law to bar write-ins (see J.A. 36), and, in 1989, the Hawaii Supreme Court authoritatively resolved the issue, both as a state constitutional and statutory matter, relying on the reasoning of this Court in *Munro* and provisions of Hawaii law that require "[a]ll candidates" to be nominated through one of the three routes noted above, and which require the primary ballots "to contain the names of all nonpartisan candidates." Pet. App. 54-55.

i. The Interest in Confining Intra-Party Feuds

By reserving the general election for "major struggles," *Storer*, 415 U.S. at 734, Hawaii seeks to permit a "winner in the general election [to enter office] with sufficient support to govern effectively." *Id.* It is this central evil of "unrestrained factionalism at the general election" at which the ban takes aim. See *Munro*, 479 U.S. at 196.

Many other States do likewise. The statutes of Nevada, Oklahoma, and South Dakota flatly ban write-ins,⁹ while Louisiana and Texas ban write-ins at run-off elections.¹⁰ Washington provides "[t]hat no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary." Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986). Illinois, New Mexico, and Ohio,¹¹ follow Washington's lead, while Kentucky and Nebraska ban write-in votes for various offices at the general election.¹²

⁹ Nev. Rev. Stat. § 293.270(2) (1991); Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989); S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990).

¹⁰ See Texas Code Ann. § 146.002 (Vernon 1986) (banning write-ins in run-off). Louisiana does not have an express bar on write-ins at the run-off, but apparently does not count them as indicated by the recent gubernatorial election in that State.

¹¹ Ill. Ann. Stat. ch. 46, ¶ 17-16.1 (1991); N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985); Ohio Rev. Code Ann. § 3513.04 (1989).

¹² Ky. Rev. Stat. § 117.265(3) (no write-ins for Pres. electors); Neb. Rev. Stat. § 32-428 (1988) (other offices).

ii. The Interest in Preventing "Party Raiding."

Relatedly, Hawaii seeks to make its state-run primary constitutional by ensuring that the parties are protected against "raiding," the phenomenon where voters of one party sabotage the results of another (usually a weaker) party's primary. See *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

At the primary, the ban, like Alaska's law, see Alaska Stat. § 15.25.070 (1988), and those of at least a dozen other States, reflects the view that primary write-ins are "'inconsistent with the whole theory of primary elections.'" *State Administrative Board v. Calvert*, 272 Md. 659, 327 A.2d 290, 299 (1974), cert. denied, 419 U.S. 1110 (1975).¹³ Thus, the ban on primary write-ins makes meaningful those candidate filing rules which protect party autonomy (e.g., HRS § 12-3(7) (certification "that the candidate is a member of the party")) and the processes available to the parties, before the primary occurs, for challenging a "raiding" candidate. See HRS § 12-8.

b. The Interest in Finality in Runaway Campaigns.

The ban on write-in voting gives finality to the primary in a further respect. In all county elections, and in

¹³ In addition to Alaska's law, see *supra* n. 9 and accompanying text, and Fla. Stat. Ann. § 101.011(6) (1989); Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988); Kan. Stat. Ann. §§ 25-213 (1986); Ind. Code Ann. § 3-8-2.5(e) (Burns Supp. 1991); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C. Gen. Stat. § 163-151(6)(e) (1987); Tex. Code Ann. § 172.112 (Vernon 1986); W. Va. Code § 3-6-5 (1978); Wis. Stat. § 8.17(3)(a) (1987-88).

state legislative races, a primary winner who faces no further opposition is seated. See HRS § 12-41(a); Haw. Const. art. III, § 4 (1991 Supp.). In other cases of runaway winners, the seat is not filled, but the winner or her party retain important powers to fill vacancies under state law. See HRS §§ 11-117, 11-118, 17-3, 17-4, 17-5. Taken together with the ban on write-ins, these provisions reinforce the primary mandate, and focus the November election on truly contested electoral contests.

c. Procedural Interests Underlying the Ban: Informing the Electorate, Promptly Qualifying the Candidates, and Eliminating Potential for Fraud.

By eliminating election day write-in nominations, Hawaii law seeks to secure, rather than inhibit, a free election.

i. The Interest in Informed Voting

By barring late-blooming campaigns, Hawaii's ban on write-in voting flushes candidates out into the political arena by a reasonable date, thus fostering the goal of informed voting. In so doing, Hawaii, for all practical purposes joins twenty-seven other States¹⁴ that refuse to grant voters " 'free and unrestricted choice' " on election day (Pet. Br. 15).

¹⁴ See Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989); Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 & Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Mass. Gen. Laws Ann. ch. 54, § 78A (West. 1991); Md. Elec.

(Continued on following page)

ii. The Interest in Preventing Vacancies

Hawaii's filing deadlines, and processes for pre-election disqualifications, as enforced by the write-in ban, also act to "prevent the occurrence of a situation where, after a candidate is elected, he [or she] is found not to possess the qualifications [for office]." *Hayes v. Gill*, 52 Haw. 251, 254, 472 P.2d 872, 875 (1973). Furthermore, the ban serves to speed the vote count, minimize the risks of recounts and eliminate challenges inherent with write-in voting.¹⁵

iii. The Interest in Combating Electoral Corruption.

Hawaii's ban on write-in voting is also a weapon against electoral corruption in general, and, in particular,

(Continued from previous page)

Code § 4D-1 (Supp. 1989); Mo. Rev. Stat. § 115.453(4) (1986); Mont. Code Ann. § 13-10-211 (1989); Neb. Rev. Stat. § 32-428.10(2) (1989); N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991); N.Y. Elec. Law § 6-154 (McKinney 1978 & Supp. 1992); N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991); N.D. Cent. Code § 16.1-12-02.2 (Supp. 1991); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991); Or. Rev. Stat. § 249.007 (Supp. 1991); Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991); Utah Code Ann. § 20-7-20 (1984 & Supp. 1991); Wash. Rev. Code Ann. § 29.04.180 (1965 & Supp. 1991); Wis. Stat. §§ 8.16(2) & 8.185(2) (1986 & Supp. 1991).

¹⁵ Even the briefest survey of modern day election litigation reveals a substantial number of cases in which elections are contested based upon the adequacy of write-in votes. See, e.g., *Weldon v. Sanders*, 99 N.M. 160, 655 P.2d 1004 (1982); *Pendleton v. District of Columbia Board*, 433 A.2d 1102 (1981); *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978); *Strmaglia v. Jenkins*, 9 Ill. App. 3d 703, 292 N.E.2d 912 (1973).

the practice of vote buying. Thus, the ban at its most basic level "secure[s] secrecy of the ballot." *Holstein v. Young*, 10 Haw. 216, 223 (1896). Without write-ins, "abuse [i]s made unprofitable since the party worker c[an]not check to see whether the bribed vote ha[s] been delivered." L.E. Fredman, *The Australian Ballot: The Story of an American Reform* 47 (1968). Cf. *Patterson v. Hanley*, 136 Cal. 265, 68 P. 821, 823 (1902).

II. The Litigation Below.

Petitioner Alan Burdick filed the first of the two actions below against the Lieutenant Governor, and the Director of Elections, on August 21, 1986, to force Hawaii "to permit the casting and counting of write-in votes[.]" J.A. 33. The main reason for the suit was the filing by only one Republican candidate, John J. Medeiros, at the primary stage for state representative in the 19th District, a fact that, in effect, prevented any other candidate from receiving votes at the general election. See J.A. 32, 276. Burdick never made an effort to gather signatures to establish a new party, or nominate a candidate in the Democratic, Republican, or nonpartisan primary elections, although he admits it would have been "quite easy" to gather the signatures to nominate a candidate. (J.A. 171).

Instead, Burdick turned to the federal courts, alleging he wanted to vote in that race, "in both the primary and general elections, for a person who has not filed nominating papers and whose name will not be printed on the ballot." J.A. 32. He also stated an interest "in vot[ing] for other persons in other elections" "whose names are not, or may not be on the election ballot." *Id.* at 32-33. The district court entered summary judgment and injunctive relief for Burdick (see Pet. App. at 66-77), relying mainly on *Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221

Cal. Rptr. 468 (1985), a decision grounded in California law. The court of appeals entered a stay, J.A. 109, and, in 1988, vacated and remanded with instructions to abstain. See *Burdick v. Takushi*, 846 F.2d 547 (9th Cir. 1988), Pet. App. 61, 66.

On remand, the district court consolidated the first case with Burdick's second suit, filed May 17, 1988, directed to the 1988 election (see J.A. 142), and certified questions to the Hawaii Supreme Court, which found no basis in the state constitution or statutes on which to moot or limit the federal issue. Apparently relying on the reasoning in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the state court held:

Hawaii's election laws provide for easy access to the ballot by new, or minority, parties, and by nonpartisan candidates. However, they do require that the nomination process be followed, and they do attempt to make the process of casting and counting ballots an orderly one, where the opportunities for fraud are minimized.

Burdick v. Takushi, 70 Haw. 498, 499-500, 776 P.2d 824, 826 (1989), Pet. App. 54-55. Thus, the court ruled, "write-in votes are not possible in [Hawaii's] statutory framework." *Id.*

On May 10, 1990, the district court nonetheless again held that the Hawaii election code was unconstitutional on its face as the ban on write in voting "impermissibly infringes on plaintiff's federal constitutional rights" and "no compelling state interests exist to justify this intrusion." *Burdick v. Takushi*, 737 F. Supp. 582, 592 (D. Haw. 1990), Pet. App. 50-51.

Despite Hawaii's other electoral avenues, the court found that Hawaii imposed burdens that were "great," and "enormous," and that the write-in ban struck "at the heart of our democratic processes," permitting the State to "substitute its judgment as to what the voters want for

the voters' own judgment." *Id.* at 588, 593, Pet. App. 41, 50, 51. The court found that, in its view, the ban "stifles what may be serious, legitimate candidacy," and, invoking a freewheeling reference to "the principle that debate on public issues should be uninhibited, robust, and wide open," nullified the ban even as to races where candidates would be seated after the primary, reasoning that "the electorate [should] be exposed to increased debate and public discussion." *Id.* at 591, Pet. App. 47-48.

On March 1, 1991, the Ninth Circuit, on Respondents' timely appeals (J.A. 205-209) reversed, and, on June 28, 1991, in response to Burdick's petition for rehearing, reaffirmed its judgment in an amended opinion (*id.* 1-17). Judge Beezer's amended opinion for the court, joined by Judges Skopil and Fernandez, reached the merits and held that, while the right to vote is "fundamental," "Burdick does not have an unlimited right to vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991), Pet. App. 10.

In so holding, the panel employed "the analytical process" identified in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), isolating, first, the burdens imposed by Hawaii law as a whole, and then comparing the interests backing the ban. 937 F.2d at 418-21, Pet. App. 9-14. Noting both the nonpartisan and party petition methods of nomination, the panel found that the election laws "provide candidates with considerable ease of access to the ballot." See 937 F.2d at 419 & n.2, Pet. App. 11. The panel also held that the ban was "a content-neutral time, place, or manner restriction," *id.*, Pet. App. at 12, and "does not place any substantial burden on [Burdick's] fundamental right." Thus, "Burdick's asserted right to vote for any candidate he chooses does not implicate fundamental constitutional protections." *Id.* at 420, Pet. App. at 12.

The panel found that Hawaii's interests also justified the ban. Thus, the ban "ensur[ed] that unrestrained factionalism does not damage the election process," and discouraged "party raiding" at the primary. *Id.*, Pet. App. at 13. The court noted that the ban fostered, an informed electorate, "protect[ed] the primary mandate," and served to "eliminate frivolous candidacies." *Id.* at 420-21, Pet. App. at 14, 15.

The panel observed that its holding was in conflict with the Fourth Circuit's in *Dixon v. Maryland State Board*, 878 F.2d 776 (4th Cir. 1989), where the court struck down Maryland's system of filing fees for individuals seeking to become "official" write-in candidates. The *Dixon* court had quite apparently overlooked the significance of Maryland's indigency waiver for the filing fee, and therefore failed to examine Maryland law "as a whole." Moreover, with respect to the issues in this case, the Fourth Circuit took the position that even a write-in vote "for Donald Duck" "might, under appropriate circumstances, be meant as serious satirical criticism of the powers that be," see 878 F.2d at 785 n.12, and that any restriction on reporting write-in votes "eliminates [the voter's] freedom to choose as he wishes." *Id.* at 785 n.13. This conflict in reasoning between the judgments here and *Dixon* formed the principal basis for Mr. Burdick's petition for certiorari. See Pet. for Cert. at 9-14, No. 91-535.¹⁶

¹⁶ Respondents essentially conceded at the Petition stage that *Dixon* conflicts, in approach, with the judgment below, and with those of the Sixth, Seventh, Eighth, and Tenth Circuits, as well as of the highest courts of California, and New York, which reject, in holding, or principle, the notion that unlimited write-in voting is federally required. See Op. Cert. at 26-28 (citing *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989); *McClain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988); *Rainbow*

(Continued on following page)

SUMMARY OF ARGUMENT

Hawaii's system of printed ballots, in which voters, by petitions and a primary, have abundant opportunity to place the names of their preferred candidates on the ballot, is not only within constitutional limits, but reflects "a decision of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991). The federal district court erred in facially nullifying Hawaii's election law, and the Ninth Circuit's correction of that error should be affirmed.

To the degree Petitioner seeks relief that would mandate Hawaii to treat his write-in "expression" as a "vote," this case directly implicates the States' broad discretion to regulate ballot access. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Petitioner's view of his claim as one of "voter's rights" does not oust Hawaii's power to regulate elections, if what is at stake is the right to "vote." Here, "rights of voters and the rights of candidates do not lend themselves to neat separation." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). The precise relief sought, a write-in ballot, does not as severely threaten ballot "crowding" as where printed ballot access is demanded. But this distinction is immaterial, because Hawaii does not rely on physical ballot crowding, *per se*, as the basis

(Continued from previous page)

Coalition v. Oklahoma State Elections Board, 844 F.2d 740, 745 n.8 (10th Cir. 1988); *Hall v. Simcox*, 766 F.2d 1171, 1175 (7th Cir.), cert. denied, 474 U.S. 1006 (1985); *Legislature of California v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991); *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d, 545 N.Y.S.2d 686 (1989)). Although Respondents urged this Court that the conflict with *Dixon* was not sufficient to warrant review, we welcome the opportunity to urge the Court to sustain the judgment below upholding Hawaii's election law.

for its ban on write-in voting. Rather, Hawaii relies on the opportunities elsewhere provided by law and compelling interests wholly independent of a desire to avoid physically long ballots. Above all, the difference between this case and those where litigants seek access to a *printed* ballot do not make this case in any other respect less of a "ballot access" case.

Seen in this light, Mr. Burdick's claim for a federal writ directing Hawaii to allow write-in votes without limit has no support in history, logic, or precedent. His argument that laws that in any way bar write-ins are unconstitutional even if a State is "extraordinarily liberal in granting candidates access to the ballot" (Pet. Br. at 31) places form over substance. If indulged by this Court, the claim would invalidate not only the laws of well over thirty States, but any system of primaries and runoffs that forces voters to choose among a discrete group of candidates. It would nullify, as well, the most routine filing deadline which, if not met, is enforced by a ban on votes for tardy candidates, and, even, candidate eligibility requirements which are a commonplace not only in the States, but in the Constitution itself. All such laws "leave some voters, at some time, without a candidate" (Pet. Br. 31), yet the States have long been permitted to enact laws that so structure their republican forms of government as "the people" desire. See generally *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Ninth Circuit properly weighed the burdens and justifications for Hawaii's write-in ban. The ban's limit on voter choice is not severe in light of Hawaii's alternatives for nominating candidates. See *Norman v. Reed*, 112 S. Ct. 698 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); cf. *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968). As Hawaii, in effect, allows nomination to the

November ballot *both* by the April petition route *and* by the September primary, Hawaii clearly provides adequate access to the printed election ballot. That access overcomes any perceived need, in *other* election systems, for write-in voting as a remedy to otherwise burdensome election laws. Cf. *Williams v. Rhodes*, *supra*.

Hawaii's write-in ban serves numerous interests, long upheld as substantial and compelling. First, it enforces Hawaii's primary process, which is designed " 'to winnow out and finally reject all but the chosen candidates,' " *Munro*, 479 U.S. at 196, barring general election candidacies by those "whose juices are riled by the results of the primary." *Stevenson v. State Board of Elections*, 796 F.2d 1176, 1177 (7th Cir. 1986) (Easterbrook J., concurring). Second, it relieves constitutional pressure upon the open primary system, by accommodating legitimate desires to open party primary processes with the need to protect the parties' autonomy. See *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). Third, it reinforces the primary mandate by eliminating genuinely uncontested races as of the close of the primary stage, see *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Fourth, the ban forces a period of open competition among candidates, aiding informed voting, and permitting time to eliminate candidates who are not eligible to serve. See *Anderson v. Celebrezze*, 460 U.S. 780, 786, 788 n.9 (1983). Fifth, the ban ensures the vote is uncorrupted. See *United States v. Classic*, 313 U.S. 299 (1941).

The decision below was particularly appropriate in that Mr. Burdick made a purely facial challenge to Hawaii's law, requiring him to show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); cf. *Renne v. Geary*, 111 S. Ct. 2331 (1991) (dismissing, as unripe, First Amendment challenge to election law in absence of specific "intention to endorse any particular

candidate"). Indeed, Petitioner has effectively conceded that the write-in ban is facially valid, for he agrees the States may employ "reasonable" measures to eliminate classes of write-in votes, *see* Pet. Br. 31 n.22, and that States need not seat a candidate who wins a write-in plurality. *Id.* at 12. *See also* Pet. Br. at 38.

In fact, seen properly, this case is not about "voting" at all, but concerns the claim that the voting booth is a public forum in which voters not only may scrawl "electoral graffiti" over the printed ballot, but expect the State, at public expense, to tabulate and publish this "protest." The claim has no merit, *e.g.*, *United States v. Kokinda*, 110 S. Ct. 3115 (1991); *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 793 (1985), and fails to comprehend that elections, at least in Hawaii, are "a vehicle only for putting candidates and laws to the electorate to vote up or down." *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (Posner, J.).

ARGUMENT

- I. The Ninth Circuit Properly Reversed the District Court's Wholesale Invalidation of Hawaii's Election Law; That Injunction Had, as a Federal Constitutional Matter, Usurped State Legislative Authority over the Electoral Process in Unprecedented Fashion.

In seeking to sustain an unlimited federal constitutional right to "dissent" by write-in vote from Hawaii's nomination processes, Petitioner distorts the minimal burdens Hawaii law imposes, and sweeps away, as insignificant, state interests long view as compelling. In so doing, Petitioner conflates several quite different strands

of First Amendment jurisprudence, and, improperly subordinates the States' vital interests in regulating electoral processes within their jurisdictions.

A. As the Court of Appeals Recognized, This Court's Principles Demand Deference to the States' Basic Decisions as to How to Structure Elections.

Decades ago, as the States debated ballot reform, this Court reaffirmed that the policy "which has prevailed from the foundation of the Government" was to "entrust[] the conduct of elections to state laws." *United States v. Gradwell*, 243 U.S. 476, 484 (1916).

Many State courts, during this period, interpreted state law to allow write-in voting. They relied on provisions for "free and open" elections,¹⁷ other unique constitutional languages,¹⁸ or ambiguities in state election statutes.¹⁹

Nothing in these rulings, of course, in any way limited the principles of federalism contemporaneously announced by this Court, and these principles, today, remain vital and require deference to Hawaii's decision to rely on a printed ballot in lieu of the option of write-in

¹⁷ *See Littlejohn v. People ex rel. Desch*, 52 Colo. 217, 121 P. 159, 162 (1912).

¹⁸ *See, e.g., Mayor and Board of Alderman of City of Jackson v. State ex rel. Howie*, 102 Miss. 663, 59 So. 873, 875 (1912); *Barr v. Cardell*, 173 Iowa 18, 155 N.W. 312, 314-15 (1915); *Jackson v. Norris*, 173 Md. 579, 195 A. 576, 588 (1937).

¹⁹ *See Canaan v. Abdelnour*, 40 Cal. 3d 703, 710 P.2d 268, 221 Cal. Rptr. 468 (1985) (and cases cited therein).

voting.²⁰ The issue in this case, of course, is thus not whether unlimited write-in voting is a good idea, but whether it is mandated not just by federal law,²¹ but by a permanent demand of the Constitution.

This Court's present commitment to a generous deference to the States' role in the elections field cannot seriously be questioned. Indeed, this Court on many occasions has "rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Last Term, this Court reaffirmed the constitutional dimension of the States' choices with respect to "the structure of [their] government[s] and the character of those who exercise government authority." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991). And only

²⁰ A federal court cannot act on state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Nor, a fortiori, could it bind Hawaii based on its view of "election common law." As it turns out, however, Hawaii's view of its laws was not necessarily inconsistent with that of mainland courts. Compare *Mayor and Board of Alderman of City of Jackson v. State ex rel. Howie*, 102 Miss. 663, 59 So. 873, 875 (1912) (write-in allowed; party primary was "exclusive" route to the ballot), and *Jackson v. Norris*, 173 Md. 579, 195 A. 576, 588 (1937) (write-in allowed; ballot access required enforcement of hundreds of voters pledging "to vote for the person"), with *McKenzie v. Boykin*, 111 Miss. 256, 71 So. 382, 384 (1916) (write-in rejected; names could be placed on ballot by petition signed "by only 15 qualified electors"), and *Jenson v. Turner*, 40 Haw. 604, 615 (1954) (write-in rejected; legislation allowed nominations by petition (25 signatures)). See also *Chamberlin v. Wood*, 15 S.D. 216, 88 N.W. 109 (1901) (upholding total ban).

²¹ One significant ramification of a ruling in favor of Petitioner in this case is that it would preempt the Congressional role in elections. See U.S. Const. art. I, § 4.

recently, this Court again announced it would defer to the States' "sufficiently weighty" interests in regulating the ballot, upholding a petition signature requirement that exceeds Hawaii's most stringent petition avenues by more than a factor of five. See *Norman v. Reed*, 112 S. Ct. 698, 705, 708 (1992).

Likewise, in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Court held with "unmistakable clarity" that a State need not make "a particularized showing" of "some level of damage" to its political system "before the legislature could take corrective action" to forestall "voter confusion," "unrestrained factionalism at the general election," or similar evils. *Id.* at 195-96. The Court ruled that the States "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.*

Moreover, wholly apart from deference due to the "state-federal balance," this Court has also agreed that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

While advocating that the Constitution, so far as the write-in voter is concerned, prohibits virtually any regulation of "the democratic process," Petitioner readily concedes that "under this Court's jurisprudence respecting rights of electoral participation, the Court has often been quite deferential in its review of state laws that regulate access to the ballot." Pet. Reply to Op. Cert. at 1, No. 91-535 (U.S. Nov. 25, 1991).

This recognition, however, involves little more than lip service. Seeking somehow to unhinge the "right to

vote" from "ballot access," Petitioner argues "[t]his is not a ballot access case" (Pet. Br. at 13), and, from there argues that the ban on write-in voting "burdens both the participatory and expressive aspects of voting" (*id.* at 19), and is not properly related "to the advancement of any of its proffered justifications" (*id.* at 39-40). Nothing in Petitioner's Brief, or elsewhere, however, diminishes the force of this Court's rulings that support Hawaii's reliance on the printed ballot.

B. The Court of Appeals Properly Treated this Case as One Implicating the Generous Deference Owed to the States as to the Decision How to Structure Access to the Ballot.

As we urged below, if Petitioner was serious in his claim that the Constitution compelled Hawaii to allow write-in voting, then this case properly was resolved under the generous standards applicable to a State's decision how best to structure ballot access. Those standards, at least as a general matter, put the issue as whether state laws "freeze the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), such that it is "virtually impossible," *Williams v. Rhodes*, 393 U.S. 23, 24 (1968), for dissident votes to be counted. See *Munro*, 479 U.S. at 199 ("candidate access to a statewide ballot," even at the primary stage, is sufficient); *Storer*, 415 U.S. at 742 (issue is whether "reasonably diligent" candidate, in petition state, can make November ballot by the petition process).

Recognizing the "strategic interest" (see Pet. Reply to Op. Cert. at 1), in posturing this case outside the framework of deference established by these decisions, Petitioner claims vehemently that "this is not a case about Hawaii's ballot access laws" (Pet. Br. at 31), justifying the entirety of this argument on the fact that Mr. Burdick

does not want any particular candidate's name to "appear on the ballot" (*id.* at 28).

The Court of Appeals rejected this feigned distinction between "ballot access" and "voters' rights," observing that "[t]he right to vote is inexorably intertwined with the State's right to regulate the election process." Pet. App. at 11. It did so with good reason. For what makes this case at all important beyond the issue of whether Hawaii must conduct an advisory public opinion poll on election day (see *infra* pp. 47-49), is Petitioner's claim that he is being denied the vote. And, what makes, to use Petitioner's term, an act of "expression, commitment and choice" (Pet. Br. 11) a "vote," instead of a mere "protest," is the capacity of that act, if joined by sufficient similarly-minded actions by fellow citizens, to effect a legal transfer of power. It is this binding legal effect of the vote that makes it a right "preservative of all other rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896). The "'rights of voters and the rights of candidates do not lend themselves to neat separation,'" *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983), and while Petitioner may not want a printed ballot, and arguments in support of the write-in ban cannot rest as centrally on the problem of physical "ballot overcrowding,"²² Petitioner is still seeking "ballot access," and the general deference deployed in ballot access cases applies.

²² As the record demonstrates, integration of write-in voting with Hawaii's computer punchcard voting methods (see J.A. 68-73 for representative ballot cards for each of the four counties in Hawaii), does require a not insignificant expansion of the ballot, as well as the need for detailed instructions, to voters, and election officials, concerning "how specifically write-in votes must be cast, and how disputes about the validity and legibility of write-in votes are to be resolved." Aff. of Dwayne Yoshina dated Oct. 3, 1986, reprinted at J.A. 66.

In sum, unless Petitioner may be deemed to have waived any claim beyond the asserted right to cast a legally ineffective "write-in protest" at the ballot box,²³ the linkage between candidates and voters applies no less here, and justifies what Petitioner concedes is the "quite deferential" review this Court has granted to State "[r]estrictions upon the access of political parties [and candidates] to the ballot." *See, e.g., Munro*, 479 U.S. at 193.

C. The Court of Appeals Properly Held that Hawaii's Ban on Write-in Voting, When Viewed in the Context of the Electoral System as a Whole, Imposes only Minimal Burdens on Petitioner's Opportunity to Exercise a Meaningful and Effective Vote.

Petitioner's central thrust is that the write-in voting ban not only "stifle[s]" his exercise of the franchise, but

²³ Because Petitioner "does not suggest that the state is obligated to permit a write-in candidate to serve in an office for which he or she is not qualified under state law" (Pet. Br. at 12), Petitioner's whole case in this Court could – and should – be interpreted to have abandoned any prayer for a true "write-in vote" injunction of the type entered by the District Court. This is so because, as presently constituted, State law would not recognize *any* write-in candidate as "qualified under state law" to hold office, in that surviving the nomination and election process, as it is now written, is a "qualification under state law" to hold any elective office. Under these circumstances, the Court certainly could – and should – deem the issue of write-in voting to have been mooted by Petitioner's own concessions. *See Deakins v. Monaghan*, 484 U.S. 193 (1988). Nonetheless, Respondents' arguments on this front go well beyond this waiver contention, in light of the importance that this Court be fully informed of the reasons not to grant a write-in voting remedy. *See also* the merits arguments contained in the Brief of the Amici States at 6-29.

renders his vote "forced," "debase[d]," "unacceptable," "utterly meaningless," and "ineffective." Pet. Br. at 9, 11, 19, 21.

These characterizations of the fact that no one in the Democratic party saw fit to run in the 1986 primary for the nineteenth state house district, and that Mr. Burdick did not bother himself to gather fifteen signatures prior to the close of the filing period in late July, aptly reveal the factual exaggeration underlying Petitioner's whole case.

At an even deeper level, they fundamentally misconceive the sorts of burdens on First Amendment interests this Court has found to be severe, and thus meriting of heightened scrutiny. *Cf. Norman v. Reed*, 112 S. Ct. at 705. Petitioner's conjuring of "serious burdens" out of the Hawaii election scheme, even though that system actually grants broad access, and, for purposes of Petitioner's case, may be assumed to grant virtually unlimited access to a printed ballot (*see* Pet. Br. at 30-31), is unsupported by precedent or sound principles.

1. The Ninth Circuit Properly Held that Hawaii's Ballot Access Laws Provide Broad Opportunity, and Impose only Minimal Burdens on First Amendment Interests.

Other than in a single footnote conclusorily disparaging two features of Hawaii's election code – the primary vote trigger for nonpartisans to advance to the general election, and the April deadline for "new party" petitions – Petitioner advances no specific challenge to the breadth of Hawaii's provisions for placing names on the printed ballot in advance of the primary and general election. *See* Pet. Br. at 30-31 & n.21. Indeed, Petitioner, for purposes of this case, concedes that the pre-election access provided by Hawaii law is virtually unlimited. Thus, "Hawai

could not escape the issues raised by this case even if it were extraordinarily liberal in granting candidates access to the ballot." *Id.* at 31. This is how Petitioner treated his claim below,²⁴ and it is this Court's prerogative to "deal with the case as it came here." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

This course is well warranted, for Hawaii's law "has not substantially burdened the 'availability of political opportunity.'" *Munro v. Socialist Workers Party*, 479 U.S. at 199.

First, as the court below wrote persuasively in 1989:

[T]he effect on a candidate's [and his supporters'] constitutional rights is "slight" when a state [as has Hawaii] affords a candidate easy access to the primary election ballot and the opportunity to wage a ballot-connected campaign. *Munro*, 479 U.S. at 199. Here, Erum had only to submit a petition signed by fifteen eligible voters to gain access to the primary ballot. This certainly qualifies as "easy access." Therefore, in light of *Munro*, the burden the Hawaii statutory scheme imposes on Erum's constitutional rights is "slight."

²⁴ As Petitioner stated candidly at his deposition:

Q. And so it would be your position that if a state provided unlimited rights in candidates to have their names printed on the ballot, that notwithstanding that unlimited access or right in a candidate to have their name printed on the ballot, that a voter, such as yourself, would have the unlimited right under the United States Constitution to cast a write-in vote for someone's name who is not on the printed ballot either at the primary or at the general election?

A. That is correct. . . .

Dep. of Alan Burdick at 27 (D. Haw. Aug. 26, 1988) (J.A. 172).

Erum v. Cayetano, 881 F.2d 689, 692-93 (9th Cir. 1989). The panel in this case followed suit, pointing to the "easy access" "to the primary ballot." 937 F.2d 419 n.2, Pet. App. 11.

Even holding aside Hawaii's petition route, *Munro* fully supports the view that any burden imposed by the write-in ban was, in effect, "slight." As this Court reasoned in *Munro*, that the State has chosen to regulate the nomination process through a primary election "is a significant difference," in that, compared to petition routes, a primary election hurdle is "a vehicle by which minor-party candidates [and independents] must demonstrate support that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions." Thus, when a State offers "easy access to the primary election ballot and the opportunity to wage a ballot-connected campaign," any burden "is slight when compared to" that of laws in petition States. *Id.* at 199.

Neither Petitioner, nor the district court rulings in his favor, have ever had any good answer to this. Indeed, nothing in *Munro*, or in its underlying logic, suggests that Hawaii's non-partisan nomination process should be treated any differently than Washington's blanket primary system.²⁵ As this Court stressed in *Munro*, "[s]tates

²⁵ While HRS § 12-41 can require a nonpartisan to obtain ten percent of the primary vote, the "least favored party provision" assures that the non-partisan need compete only against the winning party candidate with the least support. The election statistics show, for example, that, due to traditionally greater turnout in the Democratic primary, Republican candidates set the "least favored party" benchmark at less than 10 per cent in 8 of the 26 races where nonpartisans ran between 1976-1986. See Exh. "F" at 14, C.R. 47, No. 86-0582 (D. Haw.

(Continued on following page)

are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." See 479 U.S. at 189. Indeed, petitioner presented no proof that obstacles facing nonpartisans were "insuperable" (see *Munro*, 479 U.S. at 193). Under summary judgment precepts, see, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Ninth Circuit was correct in ruling for Respondents.²⁶

(Continued from previous page)

Apr. 19, 1990). New and minor parties, see *supra* note 5, have also driven down the number required. Of twenty-six nonpartisans who sought nomination between 1976 to 1986 – even before the Libertarian Party became an established party – only three were required to face the 10 percent requirement. In fourteen cases, nonpartisans were required to obtain less than 1 per cent of the primary vote. In only 5 cases were non-partisans required to obtain more than 5 per cent. See Exh. "F," *supra*.

Moreover, the public record shows that anywhere from 30-45 % of registered voters do not vote in the primary. See Office of the Lt. Gov. of Hawaii, *Results of Votes Cast: Primary Election, Sept. 17, 1988* at 11 (1988) (65.7% primary turnout); Office of the Lt. Gov. of Hawaii, *Results of Votes Cast: Primary Election, Sept. 20, 1986* at 11 (1986) (70.6% primary turnout); Office of the Lt. Gov. of Hawaii, *Results of Votes Cast: Primary Election, Sept. 22, 1984* at 11 (55.6% primary turnout). On the one hand, this means that the non-partisan's numerical goal – even if the "least favored party" rule is not in play – is substantially less than 10 per cent of the registered vote. Compare *Norman v. Reed*, 112 S. Ct. at 705 (noting requirement of 5% of registered voters). On the other, there is a large number of voters apparently uncommitted to a party and thus "up for grabs."

²⁶ Petitioner notes that Hawaii does not permit crossover voting between a party primary and the non-partisan primary, but the effects of this cut both ways, since less popular nonpartisans can ride the "coattails" of more popular independent candidates and, likewise, share collectively in a voter "revolt" in any particular race from voting in the party primaries.

Second, unlike in Washington, Hawaii's September primary is not the only gateway to the November election. Unlike numerous States, Hawaii does not confine voters to a "single nominating act." See *American Party of Texas v. White*, 415 U.S. 767, 785 n.17 (1974). Thus, new and minor party candidates and independents²⁷ may "campaign among the entire pool of registered voters" not once, but twice. Cf. *Munro*, 479 U.S. at 197. Voters may sign any number of party petitions, and still vote for anyone on the primary election ballot. Similarly, Hawaii's signature requirement is "relatively lenient," *Williams v. Rhodes*, 393 U.S. at 33 n.9; see *Norman v. Reed*, 112 S. Ct. at 705, and, although Hawaii does have a late April filing deadline for the petitions,²⁸ there is no restrictive period

²⁷ Although "*Storer* held that California's method of establishing new parties is not equivalent to or a good substitute for an independent candidacy," "things are different [here.]" *Stevenson v. State Board*, 794 F.2d 1176, 1179 (7th Cir. 1986) (Easterbrook, J.). As noted, *supra* p. 5, a "new party" needs no committees, officers, rules, or other trappings of party organization, a point underscored by Respondents' consistent view to that effect, see entries at J.A. 6-9 (the briefs filed here and in *Erum*, *supra*). This Court should accept this view. See *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *City of Lakewood v. Plain Dealer Co.*, 486 U.S. 750, 770 n.11 (1988).

²⁸ The petition deadline falls ninety days before the filing deadline for candidates in late July, the intent being that any challenges to the petitions will be accurately and conclusively litigated before the time when candidates will have to commit to a party primary, or choose to run as a nonpartisan. Compare *American Party of Texas v. White*, 415 U.S. 767, 787 n.18 ("some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges"), with *FDIC v. Mallen*, 486 U.S. 230, 243 (1988) (noting, in due process context, concern that "a decision . . . is not made with excessive haste"),

(Continued on following page)

prior to that for signature gathering.²⁹ Given the numerous third parties that have gained ballot status in Hawaii, the Ninth Circuit was more than correct in holding that "Hawaii puts few restrictions on a candidate's access to the ballot," and, hence, "the prohibition on write-in voting places only minimal restrictions on political speech." 937 F.2d at 419.

2. The Ninth Circuit's Judgment Properly Reflects the Conclusion that Write-in Voting is, so far as the Constitution is Concerned, at Most only a Remedy for Otherwise Unconstitutional Ballot Access Laws.

The Ninth Circuit's judgment properly recognized that, rather than exist as an absolute federal right, write-in voting has, at most, only been ordered as a remedy to election laws that *otherwise* were unconstitutional. This conclusion answered Petitioner's attack on Hawaii law. Indeed, as Petitioner argues, his challenge is based on the view that write-in voting is required no matter how "extraordinarily liberal" a State is in granting "access to the ballot" (Pet. Br. at 31).

(Continued from previous page)

and *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (" '[p]ublic policy dictates that there be an end of litigation' "). Seen in this light, the deadline serves to increase electoral competition by offering new party candidates the option of "getting back in the game" as nonpartisans if their petition efforts fail.

²⁹ Compare *Mandel v. Bradley*, 432 U.S. 173, 177 (1977) (per curiam) (reversing and remanding for new findings in light of "unlimited period in which signatures may be gathered" prior to March 8 deadline); *American Party of Texas*, 415 U.S. at 778 (holding 120-day pre-election deadlines "neither unreasonable nor unduly burdensome" despite 55 day gathering period).

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court affirmed a three judge court's entry of "relief" in favor of the Socialist Labor Party in the 1968 Presidential election in Ohio "to the extent of having the right, despite Ohio laws, to get the advantage of write-in ballots," *id.* at 34, but only after exhaustively detailing the severe provisions of Ohio law that made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties," *id.*, at 24. As stated by the concurring judge below in *Rhodes*:

The history of the limited participation of minority parties in the past, and the lack of any showing of an administrative burden or necessity is a clear indication that the denial of the right to write in the name of the candidate of one's choice, *when coupled with the effective denial of ballot position*, amounts to an intentional denial of the plaintiffs' constitutionally protected right to vote.

Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 997 (S.D. Ohio) (Kinneary, J., concurring) (emphasis added), *aff'd in part and modified in part*, 393 U.S. 23 (1968). Needless to say, nothing even approaching these facts is presented here.³⁰

In contrast to Petitioner and the Fourth Circuit, the other courts of appeals to have considered the issue here

³⁰ Hawaii has a special statute dealing with nominations for President and Vice President which requires political parties eligible to place candidates on the general election ballot to designate the candidates of "the state and the national party" by the 60th day prior to the election. Other groups may place names on the presidential ballot by submission, at that time, of petitions containing the signatures of currently registered voters equal in number to 1 per cent of the Hawaii vote in the last Presidential election. See HRS § 11-113. This statute was nowhere seriously addressed by Petitioner below; nor does he do so here.

have persuasively cabined write-in voting as irrelevant to the validity of election laws, and not a right. Thus, so long as a State otherwise provides sufficient opportunity "the lack of write-in votes is as a practical matter, [not] a significant distinction." *Rainbow Coalition v. Oklahoma State Elections Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988). Even if a State is in "the danger zone" by reason of a 2% party petition requirement, "barring write-in votes" cannot "put the plaintiff over the hump; as a practical matter it is a trivial distinction." *Hall v. Simcox*, 766 F.2d 1171, 1175 (7th Cir.), *cert. denied*, 474 U.S. 1006 (1985); *see also McClain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988) (having found North Dakota's laws reasonable, the claim that State "refused to count write-in votes" "does not state a federal question").

Since *Rhodes*, write-in voting has held similar stature in this Court. In *Lubin v. Panish*, 415 U.S. 709 (1974), the Court held that write-in voting would not even serve as a remedy to California's impermissible mandatory filing fee system, since, given "the realities of the electoral process," a write-in candidacy is "dubious at best." *Id.* at 719 n.5; *see Anderson v. Celebrezze*, 460 U.S. at 799 n.26 (same). Rather than give reason to elevate write-in voting into an absolute right, such statements support Hawaii's reliance on a printed ballot.

In light of this history, it would be astonishing to hold that States could not compensate for denying write-in voting by printed "access." In fact, Petitioner's argument inverts this Court's application of the First Amendment to state election laws, punishing Hawaii for substituting the more powerful weapon of "a ballot

connected campaign" (*see Munro*) for the "dubious" tool of a write-in vote (*see Lubin*).³¹

While it is true that this Court has noted the existence of write-in voting when pointing out the positive features of other States' laws, *see, e.g., Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), this Court has never suggested write-in voting is a constitutional necessity. To the contrary, States are not under an "affirmative duty" to enact every feature of the laws this Court has upheld. *American Party of Texas*, 415 U.S. at 785 n.17. Just as Texas need not allow its voters "to move freely from one to the other method of nominating candidates," *id.*, Hawaii, which permits such mobility, need not have write-ins. Indeed, to require write-in voting no matter how liberal ballot access laws are is to belie any pretense that state election laws are governed by a "flexible analytical approach" (Pet. Br. 33) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

As shown in the next section, nowhere could this be more true than with respect to Petitioner's identification of the asserted burdens inflicted by Hawaii's limit on write-in voting.

3. Petitioner's Arguments Relating to the Burden of the Write-in Voting Ban, Many of Which Were Not Raised Below, Would Nullify Any Discretion in a State To Regulate Elections.

Rather than consider the effect of Hawaii's ban on write-in voting in the context of the electoral process as a

³¹ In *Munro* itself, this Court, in upholding Washington's blanket primary scheme, took no issue with the Ninth Circuit's view of Washington law as banning write-in votes for candidates eliminated at the primary. *See Socialist Workers Party v. Munro*, 765 F.2d 1417, 1419 (9th Cir. 1985); *Cf. Norman v. Reed*, 112 S. Ct. 698 (1992) (upholding Illinois 2% signature rule notwithstanding Illinois limitations on write-in voting).

whole, Petitioner identifies three "burdens" imposed by the law, which, in essence, reflect criticism of any degree of state regulation which limits voter choice on election day.³² Although assertedly grounded in "constitutional principles" (Pet. Br. at 11), none of these criticisms withstands serious analysis.

Petitioner's first two attacks – that the ban denies him the right to cast a fully effective ballot (Pet. Br. at 19-23), and that the ban conditions the right to vote on waiver of the right not to speak (Pet. Br. at 23-25) – are answered by *Bullock v. Carter*, 405 U.S. 134 (1972). There, this Court noted that while "write-in votes are not permitted in primary elections" in Texas, "Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." *Id.* at 137. "Rather, the Texas system [only] creates barriers to candidate access," and, as a result, simply "limit[s] the field of candidates from which the voters might choose." *Id.* at 143. Petitioner's third argument, that Hawaii impermissibly favors "certain speakers because of the content of their speech" (Pet. Br. 26), is disposed of by the straightforward language of the court below: "The prohibition on write-in voting is not based on the content or subject matter of a write-in vote but rather is applicable to all write-in votes and, thus, is a content-neutral time, place, or manner restriction." 937 F.2d at 419, Pet. App. at 12. At a more basic level, Petitioner's claims rest on a flawed view both of the right to vote, and of the Hawaii electoral system.

³² Petitioner's claims that the ban inflicts "enforced" speech (Pet. Br. at 23-25), or constitutes content regulation (*id.* at 25-32), were not raised below, let alone preserved in the court of appeals, and should not even be considered. See, e.g., *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

First, Petitioner's "debasement" argument wrongly seeks to conjure out of this Court's "one person, one vote" decisions the notion that there can be no equally applied limits on election day choice at all. See Pet. Br. at 20-23 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), and *Board of Estimate v. Morris*, 489 U.S. 688 (1989)). Such logic ignores the fundamental proposition that "'the right to vote, per se, is not a constitutionally protected right,'" and that the Constitution does not compel "a fixed method of choosing state or local officers or representatives." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Indeed, Petitioner ultimately concedes that the States need not seat any of a variety of potential candidates, and that he may not (at least not really) "vote" for these ineligible persons. He thus appears to agree, as he must, that eligibility requirements, from New Hampshire's residence requirements, see *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973), to Arizona's "resign-to-run" law, see *Joyner v. Moffard*, 706 F.2d 1523 (9th Cir. 1983), are lawful. Nor does Petitioner seriously dispute that the States can condition the right to "vote," upon candidate compliance with "reasonable procedural demands imposed directly by the election code. See Pet. Br. at 31 n.22. All these regulations – which are genuinely reflected in Hawaii's election code as well – might in some sense "debase" the franchise, but it is not in any way that this Court's decisions now – or ought to – recognize as a "serious burden." No one disputes that voting rights are important, and that they must be distributed equally. See *Morris*, 489 U.S. at 693. But that truism does not make any of the neutral requirements of Hawaii law, which are each enforced through the ban, unconstitutional.

Second, Petitioner's "compelled speech" argument is just wrong factually. Hawaii does not in any way compel Mr. Burdick to vote for anyone, and, if he chooses not to support any of the candidates on the ballot, he is able to cast a "blank

vote," which will be duly recorded as such. See J.A. 215-284. Such abstentions cannot prevent a single candidate listed on the ballot from taking office, but, as the Common Cause Hawaii brief shows, the "blank vote" count plainly sends a message about the strength of a winning candidate's mandate. See Common Cause Hawaii Brief at 3. Moreover, nothing in the Hawaii electoral system is remotely coercive in the sense used by this Court in such cases as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); or *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). To put his favorite candidate(s) on the ballot, Mr. Burdick does not need to risk his job, abandon his car, or salute the flag. All he needs is a Saturday afternoon in which to gather fifteen or, if necessary, twenty-five petition signatures. "Hard work and sacrifice" "are the lifeblood of any political organization." See *American Party of Texas*, 415 U.S. at 787. This is true even for an organization of one. It literally stands the First Amendment on its head to say that the task of "petitioning for redress" is coercion, and Petitioner's argument here must fail.

Third, Petitioner's argument that the write-in ban breaches the "neutrality" principle underlying the First Amendment, is equally misplaced. Whatever may be the case in other States, in Hawaii the election booth is not "a government sponsored forum in which every voter had an unrestrained" "right" "to express his electoral preferences." See *Georges v. Carney*, 691 F.2d 297 (7th Cir. 1982). As Hawaii courts have long held, "[t]he privilege to 'write-in' a ballot would radically change both the primary and election laws." *Jenson v. Turner*, 40 Haw. 604, 613 (1954). Certainly if Hawaii allowed write-in votes for Republicans but not for the Green Party, that would raise a serious federal question. But Hawaii does not discriminate against write-in voters "on the basis of the content of [their] message." Pet. Br. at 29. Rather, if Hawaii discriminates at all, it is only because voters and

their candidates have missed a deadline, or their message has been rejected in the political marketplace. As the Ninth Circuit observed, that is not content-based regulation.

D. Under any Standard Applicable to Hawaii's Election Laws, Hawaii's Prohibition on Write-in Voting is Appropriately Backed by Long-Recognized Compelling Interests.

Hawaii's ban on write-in voting is backed by compelling state interests that suffice under any level of scrutiny.³³

1. The Interest in Protecting the Electoral Process from Unrestrained Factionalism and Frivolous Candidacies at the General Election.

Hawaii's write-in ban serves, above all, to make the primary count, "avoid[ing] the possibility of unrestrained factionalism at the general election." *Munro*, 479 U.S. at 196. Petitioner concedes eliminating write-ins for those defeated at the primary is legitimate (see Pet. Br. 38), but decries going further. In Petitioner's view, a primary may "winnow out and finally reject all but the chosen candidates" except write-in candidates not beaten in the primary. Cf. 479 U.S. at 196.

³³ Heightened scrutiny is inapt on any theory that Hawaii has engaged in the regulation of a party structure. *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). Mr. Burdick has no standing to speak for any party. See *Bender v. Williamsport Area School District*, 475 U.S. 534, 542-45 (1986). Likewise, this case has nothing to do with the laying of money penalties on speech based on its content. See *Simon & Schuster v. New York Victims Board*, 112 S. Ct. 501 (1991).

Petitioner's view is wrong for the simple reason that those "whose juices are riled by the results of the primary" include far more than the losing candidates. *Stevenson v. State Board*, 794 F.2d 1176, 1177 (7th Cir. 1986) (concurring op.). Disappointed staff, friends, supporters, and others interested in a campaign are all subject to the urge, if they dislike the primary winner, to seek a rematch in the general election. The State's interest in limiting intra-party feuding in the general election thus extends to those who "did not run in a primary election but [were] dismayed [by the result]." *Id.* at 1178.

The interest in avoiding "unrestrained factionalism" is "not only permissible, but compelling"³⁴ and "outweigh[s] the interest the candidate and his supporters may have in making a late rather than an early decision." *Storer*, 415 U.S. at 736. Moreover, a State need not "choose ineffectual means to achieve its aims." *Id.* Hawaii has no "burden of demonstrating empirically the objective effects on political stability" of general election write-ins. *Munro*, 479 U.S. at 195-98. Likewise, Hawaii can "raise the ante" for the general election by forcing candidates to show significant support. *Id.* at 196. It has an interest in permitting a "winner in the general election [to enter office] with sufficient support to govern effectively," *Storer*, 415 U.S. at 734. Vindicating all these interests as Hawaii has done is "precisely what [this Court] ha[s] held States are permitted to do." *Munro*, 479 U.S. at 198. The general election write-in ban is plainly valid.

³⁴ There are elections with no primary, notably for Education Board and Office of Hawaiian Affairs. These are extremely crowded races. See, e.g., J.A. 236, 237. A "sore loser" ban is inapt here, but other reasons, such as eliminating confusion, promoting voter education, barring frivolous candidates, and similar goals justify the ban in those situations.

2. The Interest in Protecting the Political Parties from Party Raiding.

At the primary stage, Hawaii's ban on write-in voting is closely tailored to eliminating "party raiding." See *Tashjian*, 479 U.S. at 219. Contrary to Petitioner, Hawaii is not estopped to claim the interest in preventing party raiding because we are an "open primary" State (Pet. Br. at 219). Indeed, it is precisely because we are an "open primary" State that the need for adequate protections against raiding is highly salient.

Hawaii's "open primary," see Haw. Const. art. II, § 4 (1978), is important to the State, but so is administering a primary that deflects claims, by the parties, of state sponsored infringements of their own associational rights. Under Hawaii law, the checks in the system are the statutory provisions that require party candidates to be "members of the party" and which allow challenges to these statements of membership. See HRS §§ 12-3(7) and 12-8. The effectiveness of these laws is greatly reduced by primary write-ins, for those laws are unworkable if a candidate does not file. The ban, at the primary stage, is "narrowly tailored," as Hawaii's interest in its open primary law consistent with party autonomy " 'would be achieved less effectively' " without the rule. *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989). Burdick has no answer to this (see Pet. Br. 37) and affirmance is warranted.

3. The Interest in Protecting the Political Primary Mandate and in Eliminating Uncontested Elections.

States have a "compelling" interest in striking genuinely uncontested races from the ballot. See *Canaan v. Abdelnour*, 40 Cal. 3d 703, 726, 710 P.2d 268, 283, 221 Cal. Rptr. 468, 483 (1985). Indeed, if there is any election

where the Constitution would not require a "fixed method" of resolution, it would be one in which a candidate is not seriously opposed at all. See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982).

Petitioner reluctantly concedes that Hawaii can seat run-away primary winners where candidates are "entitled by statute or constitutional provision to run unopposed," yet the mechanism, under state law, in effect applies to more than the state legislature and county offices. Compare Pet. Br. at 39 & n.28 with *supra* pp. 12-13. While in races for statewide and federal office a runaway primary winner is not "elected," the effect is practically the same. Only the rules of succession are somewhat different. See HRS §§ 11-117, 11-118. Any "reservations" one might advance over banning write-ins here are met by the fact that it is trivially easy to preempt a runaway primary winner. Hawaii should not be forbidden from enforcing its law because signatures of 15 or 25 persons cannot be had.

4. The Interest in Voter Education, Protecting Against Vacancies, and Enforcing Nomination Requirements.

Hawaii's procedural interest in flushing candidates into the open a reasonable time before the election is also compelling. "There can be no question about the legitimacy of the States' interest in fostering informed and educated expressions of the popular will." *Anderson*, 460 U.S. at 796. In diminishing "the right of the electorate to be fully informed as to whom is seeking office and what they stand for," *Gebelein v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979), Petitioner turns the First Amendment upside down. In contrast to California's bans on endorsements, See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), Hawaii's law is tailored to

increase available information. Disclosure laws are not "paternalistic," but help to enforce, the State's "interest, if not a duty, to protect the integrity of its political processes." *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981). Indeed, even the Fourth Circuit has held that voters must "have time to study the candidates to gauge their seriousness prior to the actual balloting." *Dixon v. Maryland State Board*, 878 F.2d 776, 784 (4th Cir. 1989).

Given the thirty States that regulate, often stringently, write-ins, Petitioner concedes Hawaii could "require persons seeking election as write-in candidates to register prior to the election," Pet. Br. at 31 n.22. In light of the broad claims he makes, and the opportunities he has, however, Mr. Burdick is in a poor position to claim that Hawaii law is overbroad by its substitution of "ballot-connected campaigns" for the write-in efforts allowed elsewhere only for candidates who file on time and meet minimum requirements. See *Storer*, 415 U.S. at 736-37.

Hawaii's procedural interests, however, go further. Like all States, Hawaii has minimum qualifications for its candidates, and, as Petitioner virtually admits, these have "only a negligible impact on the voters' right to have a meaningful choice of candidates." *Chimento v. Stark*, *supra*, 353 F. Supp. at 1216, 1217.³⁵ Hawaii plainly can see that those interests are vindicated before the election occurs, so that the risk is reduced of a vacancy or lengthy challenge caused by the "election" of an ineligible (or doubtfully eligible) candidate. On this front as well, the judgment below was well supported.

³⁵ One ironic result of granting Petitioner's claim is that term-limits, intended to increase competition, would be void. Compare *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991), with Brief of Common Cause/Hawaii at 3.

5. The Interest in Combating Fraud.

Last, but not least, Hawaii has a compelling interest in seeking that elections are free, not bought. Although this justification for the ban has existed from its inception, and was stressed by the Hawaii Supreme Court and Respondents below, Mr. Burdick says little in opposition to affirmance on this front, except to agree that elections should be "conducted fairly and honestly." Pet. Br. at 28. This Court, however, has clearly held that Hawaii is not encumbered with the burden of enduring "some level of damage" and can respond "with foresight." *Munro*, 479 U.S. at 195. Relaxing Hawaii's strong stand against corruption would increase the risk of fraud. That alone ends Plaintiff's claim. Cf. *Ward*, 491 U.S. at 798.

E. Affirmance is Particularly Appropriate in that the Court of Appeals was Faced With a Purely Facial Federal Challenge

Although the foregoing justifies the ban on write-in voting under any scenario, affirmance is even more warranted in light of the unusually broad manner in which Petitioner brings his case to this Court. At every step below, Petitioner made clear that his claim was that the write-in voting ban was void regardless of the facts underlying any application of the ban. His Brief here continues this tack. See Pet. Br. at 30-31.³⁶

³⁶ Even the argument with respect to the 1986 nineteenth state house district race is, in essence, a facial challenge, because Petitioner did not identify any particular candidate for whom he wished to cast a write-in vote, or take steps to nominate a candidate through lawful means. As such, his claim was, and remains, that Hawaii law is void regardless of the opportunities for printed access, or the state interests involved.

While the ban can be lawfully applied in all instances, as this case comes here the issue is whether the ban could be properly applied in *any* instance. A facial challenge, such as that here, "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); accord, *Stevenson v. State Board*, 794 F.2d 1176, 1181 (7th Cir. 1986) (Easterbrook, J., concurring) (overbreadth analysis does not apply to election law claims); see also *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Given Petitioner's own arguments conceding the legitimacy of the write-in ban as applied to sore-losers, late bloomers, and other "ineligible" candidates, Petitioner cannot conceivably prevail under this test.³⁷

II. Petitioner Cannot Obtain Reversal Upon a Public Forum Theory of "Freedom of Expression" in the Voting Booth, Unhinged from the Right to Cast a "Vote."

Petitioner's concession that he "does not suggest that the state is obligated to permit a write-in candidate to serve in an office for which he or she is not qualified under state law," Pet. Br. 12, strongly suggests, in the end,

³⁷ Indeed, in light of *Renne v. Geary*, 111 S. Ct. 2331 (1991), the Ninth Circuit may have gone too far in even considering the merits of Petitioner's claims. Here, as in *Renne*, this Court "possesses no factual record of an actual or imminent application" of the law "sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Id.* at 2339. This is so because Petitioner has never identified any "candidate" for whom he desires to vote. This is true even with respect to the 1986 state house race mentioned in the complaint. Thus, to put the matter in Article III terms, this case may not be moot, but it is dubious whether it was ever ripe, since Petitioner never made a "particular endorsement" (*id.*) sufficient to allow his claim to be considered in the context of a concrete setting.

that his claim, now, is not about the right to vote at all, but is rather about the right to conscript the resources of the State for the purpose of publicizing protest speech. Whatever the scope of this claim,³⁸ which was not preserved below,³⁹ it is meritless.

The central defect in such "protest" relief is that it unhinges the right to "vote" from its status as a right to effect legal change in the political system. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896). The right to cast "protest votes" cannot be justified on the basis of the right to "vote" at all, but rather must find support in those First Amendment doctrines that require the State not just to tolerate, see *Texas v. Johnson*, 491 U.S. 397 (1989), but to subsidize, see *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), criticism of the Government.

As the panel held, the ban on write-in voting "does not restrict the alternative channels available to Burdick for expressing his political views" and "is not based on the content or subject matter of a write-in vote." Moreover, the ban on write-in "protesting" is well justified on the compelling grounds of avoiding confusion in the voting booth, and conceptual overcrowding of the ballot with, in effect, a purely advisory question tacked onto every contest to pick an office holder. Compare *Ward*, 491 U.S. at 800, with *Munro*, 479 U.S. at 196.

Even more important, however, the issue of "narrow tailoring" applicable to time, place, and manner regulations of traditional public fora is not even implicated in a

³⁸ See *supra* note 23.

³⁹ Petitioner presented no argument in the court of appeals requesting a less-intrusive right to cast a "protest" vote; moreover, such relief is suggested nowhere in the Petition.

State's decision to exclude "advisory speech" from the voting booth. As Judge Posner put it eloquently, at least unless a State chooses to do otherwise, the ballot is "not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down." *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982).

Hawaii, of course, counts the votes of citizens for candidates who are on the ballot, whether or not they have any chance of winning.⁴⁰ These candidates, however, are on the "agenda," and thus speech for them is within "the purpose of the forum." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985). Cf. *Rust v. Sullivan*, 111 S. Ct. 1759, 1772, 1776-77 (1991). Petitioner's request to cast write-in "protests," however, seeks "to address a topic not encompassed within the purpose of the forum," and therefore may be rejected "based on [the] subject matter" of the proposed speech. *Cornelius*, 473 U.S. at 806. Hawaii's "allowance of some avenues of speech" is not "evidence that it is impermissibly suppressing other speech." *United States v. Kokinda*, 110 S. Ct. 3115, 3123 (1990) (pl. op.); see *id.* at 3126 (Kennedy, J., concurring in the judgment). Hawaii has no constitutional duty to allow write-in "protests."

⁴⁰ Although Hawaii publishes all votes cast, under *Cornelius* a State has discretion to decide how to edit its vote reports.

CONCLUSION

For the foregoing reasons and those presented by the Amici States, the judgment of the court of appeals should be affirmed.

Dated: Honolulu, Hawaii, March 2, 1992.

WARREN PRICE, III
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
GIRARD D. LAU
Deputy Attorneys General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

Counsel for Respondents

APPENDIX

APPENDIX "A"

Chapters 11, 12, 16, and 17, Hawaii Revised Statutes ("HRS") (1985 & Supp. 1991) (pertinent excerpts)

PART I. GENERAL PROVISIONS

§11-1 Definitions. Whenever used in this title, the words and phrases in this title shall, unless the same is inconsistent with the context, be construed as follows:

"Ballot," a ballot including an absentee ballot is a written or printed, or partly written and partly printed paper or papers containing the names of persons to be voted for, the office to be filled, and the questions or issues to be voted on. A ballot may consist of one or more cards or pieces of paper, or one face of a card or piece of paper, or a portion of the face of a card or piece of paper, depending on the number of offices, candidates to be elected thereto, questions or issues to be voted on, and the voting system in use. It shall also include the face of the mechanical voting machine when arranged with cardboard or other material within the ballot frames, containing the names of the candidates and questions to be voted on.

"Chief election officer," the lieutenant governor as set forth in section 11-2.

"Clerk," the county clerks of the respective counties.

"County," the counties of Hawaii, Maui, Kauai, and the city and county of Honolulu, as the context may require. For the purposes of this title, the county of Kalawao shall be deemed to be included in the county of Maui.

"Election," all elections, primary, special primary, general, special general, special, or county, unless otherwise specifically stated.

"Election officials," precinct officials and other persons designated as officials by the chief election officer.

"Hawaiian," any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Office," an elective public office.

"Political party" or "party," a political party qualified under part V of this chapter.

"Precinct," the smallest political subdivision established by law.

"Primary," a preliminary election in which the voters nominate candidates for office as provided for in chapter 12.

"Service bureau" means a firm registered to do business in the State and whose principal business is furnishing data processing services.

"Special election," any single election required by law when not preceded by an election to nominate those candidates whose names appear on the special election ballot.

"Special primary election" and "special general election," elections held only (a) whenever any vacancy occurs in the offices of United States senator, United

States representative, state senator, or state representative because of failure to elect a person at an uncontested general election or (b) as specified in county charters.

"Voter," any person duly registered to vote.

"Voting system," the use of paper ballots, electronic ballot cards, voting machines, or any system by which votes are cast and counted. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(a); am L 1979, c 196, §3; am L 1980, c 264, §1(a)] [am L 1987, c 232, §1; am L 1990, c 156, §4]

§11-2 Chief election officer. (a) The lieutenant governor shall be the chief election officer for the administration of this title. The lieutenant governor shall supervise all state elections. The chief election officer may delegate responsibilities in state elections within a county to the clerk of that county or to other specified persons.

(b) The chief election officer shall be responsible for the maximization of registration of eligible electors throughout the State. In maximizing registration the chief election officer shall make an effort to equalize registration between districts, with particular effort in those districts in which the chief election officer determines registration is lower than desirable. The chief election officer in carrying out this function may make surveys, carry on house to house canvassing, and assist or direct the clerk in any other area of registration.

(c) The chief election officer shall maintain data concerning registered voters, elections, apportionment, and districting. The chief election officer shall use this data to assist the reapportionment commission provided for under Article IV of the Constitution.

(d) The chief election officer shall be responsible for public education with respect to voter registration and information. [am L 1990, c 116, §2] [L 1970, c 26, pt of §2; am L 1979, c 51, §5; am imp L 1984, c 90, §1]

§11-3 Application of chapter. This chapter shall apply to all elections, primary, special primary, general, special general, special, or county, held in the State, under all voting systems used within the State, so far as applicable and not inconsistent herewith. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(b)]

§11-4 Rules and regulations. The chief election officer may make, amend, and repeat such rules and regulations governing elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar matters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.

In making, amending, and repealing rules and regulations for voters who cannot vote at the polls in person and all other voters, the chief election officer shall provide for voting by such persons in such manner as to insure secrecy of the ballot and to preclude tampering with the ballots of these voters and other election frauds. Such rules and regulations, when adopted in conformity with chapter 91 and upon approval by the governor, shall have the force and effect of law. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§11-5 Employees. The chief election officer may employ a permanent staff, subject to the provisions of chapters 76 and 77, to supervise state elections; maximize

registration of eligible voters throughout the State; maintain data concerning registered voters, elections, apportionment, and districting; and to perform other duties as prescribed by law. The chief election officer or county clerk may employ precinct officials and other election employees as the chief election officer or county clerk may find necessary, none of whom shall be subject to the provisions of chapters 76 and 77. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(c); am L 1977, c 199, §2; am imp L 1984, c 90, §1]

* * *

PART V. PARTIES

§11-61 "Political party" defined. (a) The term "political party" means any party which has qualified as a political party under sections 11-62 and 11-64 and has not been disqualified by this section. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements or the requirements set forth in sections 11-62 to 11-63, shall be subject to disqualification:

- (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraphs (2) to (5) whose terms had expired. This does not include those offices which were vacant

because the incumbent had died or resigned before the end of the incumbent's term;

- (2) The party received at least ten per cent of all votes cast for any of the offices voted upon by all the voters in the State;
- (3) The party received at least ten per cent of all the votes cast in at least fifty per cent of the congressional districts;
- (4) The party received at least ten per cent of all the votes cast in at least the six senatorial districts with the lowest votes cast for the office of state senator; or
- (5) The party received at least ten per cent of all the votes cast in at least fifty per cent of the representative districts for the office of state representative. [L 1970, c 26, pt of §2; am L 1979, c 125, §3(1); am L 1983, c 34, §3; am L 1986, c 323, §1]

§11-62 Qualification of political parties; petition. (a)

Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as hereinafter provided. The petition for qualification as a political party shall:

- (1) Be filed not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary;
- (2) Declare as concisely as may be the intention of signers thereof to qualify as a statewide political party in the State and state the name of the new party;

- (3) Contain the signatures of currently registered voters comprising not less than one per cent of the total registered voters of the State as of the last preceding general election;
- (4) Be accompanied by the names and addresses of the officers of the central committee and of the respective county committees of the political party and by the party rules; and
- (5) Be upon the form prescribed and provided by the chief election officer.

(b) The petition shall be subject to hearing under chapter 91, if any objections are raised by the chief election officer or any other political party. All objections shall be made not later than 4:30 p.m. on the tenth day after the petition has been filed. If no objections are raised by 4:30 p.m. on the tenth day, the petition shall be approved. If an objection is raised, a decision shall be rendered not later than 4:30 p.m. on the thirtieth day after filing of the petition or not later than 4:30 p.m. on the one hundredth day prior to the primary, whichever shall first occur.

(c) The chief election officer may check the names of any persons on the petition to see that they are registered voters and may check the validity of their signatures. The petition shall be public information upon filing.

(d) Each group of persons desiring to qualify as a political party shall qualify under this section for three general elections, after which the group shall be deemed a political party for the following ten-year period, provided that each party qualified under this section shall

continue to field candidates for public office during the ten year period following qualification. After each ten-year period, the party qualified under this section shall either remain qualified under the standards set forth in section 11-61, or requalify under this section 11-62. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(p); am L 1983, c 34, §4; am L 1986, c 323, §2]

§11-63 Party rules, amendments to be filed. All parties must file their rules with the chief election officer not later than 4:30 p.m. on the one hundred fiftieth day prior to the next primary. All amendments shall be filed with the chief election officer not later than 4:30 p.m. on the thirtieth day after their adoption. The rules and amendments shall be duly certified to by an authorized officer of the party and upon filing, the rules and amendments thereto shall be a public record. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(q); am L 1983, c 34, §5; am L 1986, c 323, §3]

* * *

§11-64 Names of party officers to be filed. All parties shall submit to the chief election officer and the respective county clerks not later than 4:30 p.m. on the ninetieth day prior to the next primary, a list of names and addresses of officers of the central committee and of the respective county committees. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(r); am L 1983, c 34, §6]

§11-65 Determination of party disqualification, notice of disqualification. Not later than 4:30 p.m. on the one hundred twentieth day after a general election, the chief election officer shall determine which parties were qualified to participate in the last general election, but

which have become disqualified to participate in the forthcoming elections. Notice of intention to disqualify shall be served by certified or registered mail on the chairman, any officer of the central committee of the party, as shown by the records of the chief election officer. In addition, notice of intention to disqualify shall also be given by publication in a newspaper of general circulation.

If an officer of the party whose name is on file with the chief election officer desires a hearing on the notice of intention to disqualify, the officer of the party shall, not later than 4:30 p.m. on the tenth day after service by mail or not later than 4:30 p.m. on the tenth day after the last day upon which the notice is published in any county, whichever is later, file an affidavit with the chief election officer setting forth facts showing the reasons why the party should not be disqualified. The chief election officer shall call a hearing not later than twenty days following receipt of the affidavit. The chief election officer shall notify by certified or registered mail the officer of the party who filed the affidavit of the date, time and place of the hearing. In addition, notice of the hearing shall be published in a newspaper of general circulation not later than five days prior to the day of the hearing. The chief election officer shall render the chief election officer's decision not later than 4:30 p.m. on the seventh day following the hearing. If the party does not file the affidavit within the time specified, the notice of intention to disqualify shall constitute final disqualification. A party thus disqualified shall have the right to requalify as a new party by following the procedures of section 11-62.

[L 1970, c 26, pt of §2; am L 1973, c 217, §1(5); am L 1977, c 189, §1(4); am imp L 1984, c 90, §1]

* * *

PART VIII. BALLOTS

§11-111 Official and facsimile ballots. Ballots issued by the chief election officer in state elections and by the clerk in county elections are official ballots. In elections using the paper ballot and electronic voting systems, the chief election officer or clerk in the case of county elections shall have printed informational posters containing facsimile ballots which depict the official ballots to be used in the election. The precinct officials shall post the informational posters containing the facsimiles of the official ballots near the entrance to the polling place where they may be easily seen by the voters prior to voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ee); am L 1975, c 36, §1(4); am L 1980, c 264, §1(f)]

§11-112 Contents of ballot. (a) The ballot shall contain the names of the candidates, their party affiliation or nonpartisanship in partisan election contests, the offices for which they are running, and the district in which the election is being held. In multimember races the ballot shall state that the voter shall not vote for more than the number of seats available or the number of candidates listed where such number is less than the seats available.

(b) The ballot may include questions concerning proposed state constitutional amendments, proposed county charter amendments, or proposed initiative or referendum issues. When the legislature passes a bill to

submit a proposed constitutional amendment to the electorate, the bill shall contain the exact question that is to be printed on the ballot. The question shall be phrased to require a "yes" or "no" response by the voter.

(c) At the chief election officer's discretion, the ballot may have a background design imprinted onto it.

(d) When the electronic voting system is used, the ballot may have pre-punched codes and printed information which identify the voting districts, precincts, and ballot sets to facilitate the electronic data processing of these ballots.

(e) The name of the candidate may be printed with the Hawaiian or English equivalent or nickname, if the candidate so requests in writing at the time the candidate's nomination papers are filed. Candidates' names, including the Hawaiian or English equivalent or nickname, shall be set on one line.

(f) The ballot shall bear no word, motto, device, sign, or symbol other than allowed in this title. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(5); am L 1977, c 189, §1(7); am L 1980, c 264, §1(g); am L 1983, c 34, §13; am L 1984, c 62, §1]

§11-113 Presidential ballots. (a) In presidential elections, the names of the candidates for president and vice president shall be used on the ballot in lieu of the names of the presidential electors, and the votes cast for president and vice president of each political party shall be counted for the presidential electors and alternates nominated by each political party.

(b) A "national party" as used in this section shall mean a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party. If there is no national party or the national and state parties or factions in either the national or state party do not agree on the presidential and vice presidential candidates, the chief election officer may determine which candidates' names shall be placed on the ballot or may leave the candidates' names off the ballot completely.

(c) All candidates for president and vice president of the United States shall be qualified for inclusion on the general election ballot under either of the following procedures:

(1) In the case of candidates of political parties which have been qualified to place candidates on the primary and general election ballots, the appropriate official of those parties shall file a sworn application with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election, which shall include:

- (A) The name and address of each of the two candidates;
- (B) A statement that each candidate is legally qualified to serve under the provisions of the United States Constitution;
- (C) A statement that the candidates are the duly chosen candidates of both

the state and the national party, giving the time, place, and manner of the selection.

(2) In the case of the candidates of parties or groups not qualified to place candidates on the primary or general election ballots, the person desiring to place the names on the general election ballot shall file with the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election:

- (A) A sworn application which shall include the information required under (1)(A) and (B) above, and (C) where applicable;
- (B) A petition which shall be upon the form prescribed and provided by the chief election officer containing the signatures of currently registered voters which constitute not less than one per cent of the votes cast in the State at the last presidential election. The petition shall contain the names of the candidates, a statement that the persons signing intend to support those candidates, the address of each signatory, the date of the signer's signature and other information as determined by the chief election officer.

Prior to being issued the petition form, the person desiring to place the names on the general election ballot shall submit a notarized statement from each candidate of that person's intent to be a candidate for president or vice president of the United States

on the general election ballot in the State of Hawaii.

(d) Each applicant, and the candidates named, shall be notified in writing of the applicant's or candidate's eligibility or disqualification for placement on the ballot not later than 4:30 p.m. on the tenth day after filing or not later than 4:30 p.m. on the fiftieth day prior to the presidential election, whichever is less.

(e) If the applicant, or any other party, individual, or group with a candidate on the presidential ballot, objects to the finding of eligibility or disqualification the person may, not later than 4:30 p.m. on the fifth day after the finding, file a request in writing with the chief election officer for a hearing on the question. A hearing shall be called not later than 4:30 p.m. on the tenth day after the receipt of the request and shall be conducted in accord with chapter 91. A decision shall be issued not later than 4:30 p.m. on the fifth day after the conclusion of the hearing. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ff); am L 1977, c 189, §1(8); am L 1983, c 34, §14]

§11-114 Order of offices on ballot. The order of offices on a ballot shall be arranged substantially as follows: first, president and vice president of the United States; next, United States senators; next, United States house of representatives; next, governor and lieutenant governor; next, state senators; next, state representatives; and next, county offices. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(gg); am L 1980, c 264, §1(h)]

§11-115 Arrangement of names on the ballot. The names of the candidates shall be placed upon the ballot for their respective offices in alphabetical order except as

provided in section 11-118 and the limitations of the voting system in use, and except for the case of the candidates for vice president and lieutenant governor in the general election whose names shall be placed immediately below the name of the candidate for president or governor of the same political party.

In elections using the paper ballot or electronic voting systems where the names of the candidates are printed and the voter records the voter's vote on the face of the ballot, the following format shall be used: A horizontal line shall be ruled between each candidate's name and the next name, except between the names of presidential and vice presidential candidates and candidates for governor and lieutenant governor of the same political party in the general election. In such case the horizontal line will follow the name of the candidates for vice president and lieutenant governor of the same political party, thereby grouping the candidates for president and vice president and governor and lieutenant governor of the same political party within the same pair of horizontal lines. Immediately after all the names, on the right side of the ballot, two vertical lines shall be ruled, so that in conjunction with the horizontal lines, a box shall be formed opposite each name and its equivalent, if any. In case of the candidates for president and vice president and governor and lieutenant governor of the same political party, only one box shall be formed opposite their set of names. The boxes shall be of sufficient size to give ample room in which to designate the choice of the voter in the manner prescribed for the voting system in use. All of the names upon a ballot shall be placed at a uniform distance from the left edge and close thereto, and shall be

of uniform size and print subject to section 11-119. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(hh); am L 1976, c 106, §1(8); am L 1977, c 189, §1(9); am imp L 1984, c 90, §1]

§11-116 Checking ballot form by candidates and parties. Facsimiles of all ballot layouts prior to printing shall be available for viewing by the candidates and the parties at the office of the chief election officer and the county clerk as soon after the close of filing as they are available. Such layout facsimiles shall show the type faces used, the spelling and placement of names, and other information on the ballot. [L 1970, c 26, pt of §2]

§11-117 Withdrawal of candidates; disqualification; death; notice. (a) Any candidate may withdraw not later than 4:30 p.m. on the day immediately following the close of filing for any reason and may withdraw after the close of filing up to 4:30 p.m. on the twentieth day prior to an election for reasons of ill health. When a candidate withdraws for ill health, the candidate shall give notice in writing to the chief election officer if the candidate was seeking a congressional or state office, or the candidate shall give notice in writing to the county clerk if the candidate was seeking a county office. The notice shall be accompanied by a statement from a licensed physician indicating that such ill health may endanger the candidate's life.

(b) On receipt of the notice of death, withdrawal, or upon determination of disqualification, the chief election officer or the clerk shall inform the chairperson of the political party of which the person deceased, withdrawing, or disqualified was a candidate. When a candidate

dies, withdraws, or is disqualified after the close of filing and the ballots have been printed, the chief election officer or the clerk may order the candidate's name stricken from the ballot or order that a notice of the death, withdrawal, or disqualification be prominently posted at the appropriate polling places on election day.

(c) In no case shall the filing fee be refunded after filing. [L 1970, c 26, pt of §2; am L 1972, c 77, §5; am L 1973, c 217, §1(ii); am L 1983, c 34, §15]

§11-118 Vacancies; new candidates; insertion of names on ballots. (a) In case of death, withdrawal, or disqualification of any party candidate after filing, the vacancy so caused may be filled by the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification.

(b) If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m. on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order. If the party fails to fill the vacancy pursuant to this subsection, no candidate's name shall be printed on the ballot for the party for that race.

(c) If the ballots have been printed and it is not reasonably possible to insert an alternate's name, the chief election officer shall issue a proclamation informing

the public that the votes cast for the vacating candidate shall be counted and the results interpreted as follows:

- (1) In a primary or special primary election:
 - (A) In partisan races, if, but for candidate's vacancy, the vacating candidate would have been nominated pursuant to section 12-41(a), a vacancy shall exist in the party's nomination, to be filled in accordance with subsection (b).
 - (B) In nonpartisan races, if, but for the candidate's vacancy, the vacating candidate would have qualified as a candidate for the general or special general election ballot pursuant to section 12-41(b), the nonpartisan candidate who received the next highest number of votes shall be placed on the ballot provided that the candidate also meets the requirements of section 12-41(b).
- (2) In a special, general, or special general election, if, but for the candidate's vacancy, the vacating candidate would have been elected, a vacancy shall exist in the office for which the race in question was being held, to be filled in the manner provided by law for vacancies in office arising from the failure of an elected official to serve the official's full term because of death, withdrawal, or removal.
- (3) In any other case where, but for the candidate's vacancy, the vacating candidate would have been deemed elected, a vacancy

shall exist in the office for which the candidate has filed, to be filled in the manner provided by law for vacancies in office arising from the failure of an elected official to serve the official's full term in office because of death, withdrawal, or removal.

(d) The parties shall adopt rules to comply with this provision, and those rules shall be submitted to the chief election officer.

(e) The chief election officer or county clerk in county elections may waive any or all of the foregoing requirements in special circumstances as provided in the rules adopted by the chief election officer. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(jj); am L 1980, c 247, §1; am L 1983, c 34, §16; am L 1986, c 305, §1; am L 1990, c 7, §3]

§11-119 Printing; quantity. (a) The ballots shall be printed by order of the chief election officer or the clerk in the case of county elections. In any state or county election the chief election officer on agreement with the clerk may consolidate the printing contracts for similar types of ballots where such consolidation will result in lower costs.

(b) Whenever the chief election officer is responsible for the printing of ballots, the exact wording to appear thereon, including, but not limited to, questions and issues shall be submitted to the chief election officer not later than 4:30 p.m. on the sixtieth calendar day prior to the applicable election.

(c) Based upon clarity and available space, the chief election officer or the clerk in the case of county elections shall determine the style and size of type to be used in

printing the ballots. The color, size, weight, shape, and thickness of the ballot shall be determined by the chief election officer.

(d) Each precinct shall receive a sufficient number of ballots based on the number of registered voters and the expected spoilage in the election concerned. A sufficient number of absentee ballots shall be delivered to each clerk not later than 4:30 p.m. on the fifteenth day prior to the date of any election. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(kk); am L 1975, c 36, §1(6); am L 1976, c 106, §1(9); am L 1979, c 133, §4; am L 1980, c 264, §1(i); am L 1985, c 203, §4]

§11-120 Distribution of ballots; record. The chief election officer or the county clerk in county elections shall forward the official ballots, specimen ballots, and other materials to the precinct officials of the various precincts. They shall be delivered and kept in a secure fashion in accordance with rules and regulations promulgated by the chief election officer. In no case shall they arrive later than the opening of the polls on election day.

A record of the number of ballots sent to each precinct shall be kept by the chief election officer or the clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ll)]

§11-131 Hours of voting. The polls shall be opened by the precinct officials at 7:00 a.m. of the election day and shall be kept open continuously until 6:00 p.m. of that day. If, at the closing hour of voting, any voter desiring to vote is standing in line outside the entrance of the polls with the desire of entering and voting, but due to the polling place being overcrowded has been unable to do so, the voter shall be allowed to vote irrespective of

the closing hour of voting. No voter shall be permitted to enter or join the line after the prescribed hour for closing the polls. If all of the registered voters of the precinct have cast their votes prior to the closing time, the polls may be closed earlier but the votes shall not be counted until after closing time unless allowed by the chief election officer. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(mm); am imp L 1984, c 90, §1]

§11-132. One thousand foot radius; admission within polling place. (a) The precinct officials shall post in a conspicuous place, prior to the opening of the polls, a map designating an area of one thousand feet in radius around the polling place. Any person who remains or loiters within an area of one thousand feet in radius around the polling place for the purpose of campaigning shall be guilty of a misdemeanor.

(b) Admission within the polling place shall be limited to the following:

- (1) Election officials;
- (2) Watchers, if any, pursuant to section 11-77;
- (3) Candidates;
- (4) Any voters actually engaged in voting, going to vote or returning from voting;
- (5) Any person, designated by a voter who is physically disabled, while the person is assisting the voter; and
- (6) Any person or nonvoter group authorized by the chief election officer or the clerk in county elections to observe the election at

designated precincts for educational purposes provided that they conduct themselves so that they do not interfere with the election process. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(nn); am L 1975, c 36, §1(7); am L 1980, c 264, §1(j); am imp L 1984, c 90, §1]

§11-133 Voting booths; placement of visual aids. The precinct officials shall provide sufficient voting booths within the polling place at or in which the voters may conveniently cast their ballots. The booths shall be so arranged that in casting the ballots the voters are screened from the observation of others.

Visual aids shall be posted at or in each voting booth and in conspicuous places outside the polling place before the opening of the polls. [L 1970, c 26, pt of §2; am L 1973, c 217, §(oo); am L 1975, c 36, §1(7A); am L 1981, c 100, §1(2)]

§11-134 Ballot transport containers; ballot boxes. (a) The seals of the ballot transport containers shall be broken and opened on election day only in the presence of at least two precinct officials not of the same political party.

(b) The chief election officer shall provide suitable ballot boxes for each polling place needed. They shall have a hinged lid fastened securely by a nonreusable seal. In the center of the lid there shall be an aperture of the appropriate size for the voting system used. The ballot boxes shall be placed at a point convenient for the deposit of ballots and where they can be observed by the precinct officials.

(c) At the opening of the polls for election, the chairperson of the precinct officials shall publicly open the ballot boxes and expose them to all persons present to show that they are empty. The ballot boxes shall be closed and sealed; they shall remain sealed until transported to the counting center; provided that, in precincts where the electronic voting system is used, the ballot boxes shall not be opened at the polling places except as provided by rules adopted pursuant to chapter 91. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(8); am L 1980, c 264, §1(k); am L 1983, c 34, §17]

§11-135 Early collection of ballots. In an electronic ballot system election the chief election officer may authorize collection of voted ballots before the closing of the polls in order to facilitate the counting of ballots; provided that the voted ballots shall be returned to the counting center in sealed ballot boxes. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(pp); am L 1975, c 36, §1(9); am L 1980, c 264, §1(l); am L 1983, c 34, §18]

§11-136 Poll book identification, voting. Every person upon applying to vote shall sign the person's name in the poll book prepared for that purpose. This requirement may be waived by the chairman of the precinct officials if for reasons of illiteracy or blindness or other physical disability the voter is unable to write. Every person shall provide identification if so requested by a precinct official.

After signing the poll book and receiving the voter's ballot, the voter shall proceed to the voting booth to vote according to the voting system in use in the voter's precinct. The precinct official may, and upon request

shall, explain to the voter the mode of voting. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(qq); am imp L 1984, c 90, §1]

§11-137 Secrecy; removal or exhibition of ballot. No person shall look at or ask to see the contents of the ballot or the choice of party or nonpartisan ballot of any voter, except as provided in section 11-139, nor shall any person within the polling place attempt to influence a voter in regard to whom the voter shall vote for. When a voter is in the voting booth for the purpose of voting, no other person shall, except as provided in section 11-139, be allowed to enter the booth or to be in a position from which the person can observe how the voter votes.

No person shall take a ballot out of the polling place except as provided in sections 11-135 and 11-139. After voting the voter shall leave the voting booth and deliver the voter's ballot to the precinct official in charge of the ballot boxes. The precinct official shall make certain that the precinct official has received the correct ballot and no other and then shall deposit the ballot into the ballot box. No person shall look at or ask to see the contents of the unvoted ballots. If any person having received a ballot leaves the polling place without first delivering the ballot to the precinct official as provided above, or wilfully exhibits the person's ballot or the person's unvoted ballots in a special primary or primary election, except as provided in section 11-139, after the ballot has been marked, such person shall forfeit the person's right to vote, and the chairman of the precinct officials shall cause a record to be made of the proceeding. [L 1970, c 26, pt of §2; am L 1972, c 158, §1; am L 1973, c 217, §1(rr); am L

1975, c 36, §1(10); am L 1980, c 264, §1(m); am imp L 1984, c 90, §1]

§11-138 Time allowed voters. A voter shall be allowed to remain in the voting booth for five minutes, and having voted the voter shall at once emerge and leave the voting booth. If the voter refuses to leave when so requested by a majority of precinct officials after the lapse of five minutes, the voter shall be removed by the precinct officials. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ss); am L 1980, c 264, §1(n); am imp L 1984, c 90, §1]

§11-139 Voting assistance. (a) Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or agent of the voter's union, or the voter may receive the assistance of two precinct officials who are not of the same political party. Before rendering assistance or permitting assistance to be rendered, the precinct officials shall be satisfied that the physical disability exists. If a voter with a physical disability finds it unduly burdensome to enter the polling place, the voter may be handed a ballot outside the polling place but within one hundred feet thereof by the precinct officials and in their presence but in a secret manner, mark and return the same to the precinct officials.

(b) The precinct officials shall enter in writing in the record book the following:

- (1) The voter's name;
- (2) The fact that the voter cannot read the names on the ballot, if that is the reason for

requiring assistance, and otherwise, the specific physical disability which requires the voter to receive assistance; and

- (3) the name or names of the person or persons furnishing the assistance. [L 1970, c 26, pt of §2; am L 1972, c 158, §2; am L 1973, c 217, §1(tt); am L 1985, c 203, §5]

§11-140 Spoiled ballots. In elections using the paper ballot and electronic voting systems, if a voter spoils a ballot, the voter may obtain another upon returning the spoiled one. Before returning the spoiled ballot, the voter shall conform to the procedure promulgated by the chief election officer to retain the secrecy of the vote. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(uu); am L 1975, c 36, §1(11); am L 1980, c 264, §1(o); am L 1981, c 100, §1(3)]

PART X. VOTE DISPOSITION

§11-151 Vote count. Each contest or question on a ballot shall be counted independently as follows:

- (1) If the votes cast in a contest or question are equal to or less than the number to be elected or chosen for that contest or question, the votes for that contest or question shall be counted.
- (2) If the votes cast in a contest or question exceed the number to be elected or chosen for that contest or question, the votes for that contest or question shall not be counted.
- (3) If a contest or question requires a majority of the votes for passage, any blank, spoiled,

or invalid ballot shall not be tallied for passage or as votes cast except that such ballots shall be counted as votes cast in ratification of a constitutional amendment. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(12); am L 1986, c 305, §2]

§11-152 Method of counting. (a) In an election using the paper ballot voting system, immediately after the close of the polls, the chairman of the precinct officials shall open the ballot box. The precinct officials at the precinct shall proceed to count the votes as follows:

- (1) The whole number of ballots shall first be counted to see if their number corresponds with the number of ballots cast as recorded by the precinct officials;
- (2) If the number of ballots corresponds with the number of persons recorded by the precinct officials as having voted, the precinct officials shall then proceed to count the vote cast for each candidate;
- (3) If there are more ballots or less ballots than the record calls for the precinct officials shall proceed as directed in section 11-153.

(b) In those precincts using the electronic voting system, the ballots shall be taken in the sealed ballot boxes to the counting center according to the procedure and schedule promulgated by the chief election officer to promote the security of the ballots. In the presence of official observers, counting center employees may start to count the ballots prior to the closing of the polls provided there shall be no printout by the computer or other disclosure of the number of votes cast for a candidate or on a question prior to the closing of the polls. [L 1970, c 26, pt

of §2; am L 1973, c 217, §1(vv); am L 1975, c 36, §1(13); am L 1977, c 189, §1(10); am L 1980, c 264, §1(p)]

§11-153 More or less ballots than recorded. If there are more ballots than the poll book indicates, this shall be an overage and if less ballots, it shall be an underage. The election officials or counting center employees responsible for the tabulation of ballots shall make a note of this fact on a form to be provided by the chief election officer. The form recording the overage or underage shall be sent directly to the chief election officer or the clerk in county elections separate and apart from the other election records.

If the electronic voting system is being used in an election, the overage or underage may be recorded after the tabulation of the ballots. In an election using the paper ballot voting system, the precinct officials shall proceed to count the vote cast for each candidate or on a question after recording the overage or underage.

As soon after the election as possible the chief election officer or the clerk shall make a list of all precincts in which an overage or underage occurred and the amount of the overage or underage. This list shall be kept as a public record in the office of the chief election officer or the clerk in county elections and the clerk's office in counties other than the city and county of Honolulu in elections involving state candidates.

An election contest may be brought under part XI, if the overage or underage in any district could affect the outcome of an election. [L 1970, c 26, pt of §2; am L 1975, c 36, §1(14)]

§11-154 Records, etc.; disposition. The final duty of the precinct officials in the operation of the precinct shall be to gather all records and supplies delivered to them and return them to the sending official, either the chief election officer or the county clerk.

The voted ballots shall be kept secure and handled only in the presence of representatives not of the same political party in accordance with regulations promulgated for the various voting systems. After all the ballots have been tabulated they shall be sealed in containers. Thereafter these containers shall be unsealed and resealed only as prescribed by rules and regulations governing the elections.

The ballots and other election records may be destroyed by the chief election officer or county clerk when all elected candidates have been certified by the chief election officer, or in the case of candidates for county offices, by the county clerk. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(ww)]

§11-155 Certification of results of election. On receipt of certified tabulations from the election officials concerned, the chief election officer or county clerk in county elections shall compile, certify, and release the election results after the expiration of the time for bringing an election contest. A certificate of election or a certificate of results declaring the results of the election as of election day shall be issued pursuant to section 11-156. The number of candidates to be elected receiving the highest number of votes in any election district shall be declared to be elected. Unless otherwise provided, the term of office shall begin or end as of the close of polls on

election day. The position on the question receiving the appropriate majority of the votes cast shall be reflected in a certificate of results issued pursuant to section 11-156. [L 1970, c 26, pt of §2; am L 1980, c 264, §1(b); am L 1986, c 305, §3]

§11-156 Certificate of election and certificate of results, form. The chief election officer or county clerk shall deliver certificates of election to the persons elected as determined under section 11-155. The chief election officer or county clerk in county elections shall issue certificates of results where a question has been voted upon. Certificates of election shall be delivered only after the filing of expense statements by the person elected in accordance with part XII and after the expiration of time for bringing an election contest. The certificate of election shall be substantially in the following form:

CERTIFICATE OF ELECTION

I, _____, chief election officer (county clerk) of Hawaii (county), do hereby certify that _____ was on the _____ day of _____ 19____, duly elected a _____ (name of office) for the _____ district for a term expiring on the _____ day of _____, A.D. 19____

Witness my hand this _____ day of _____, A.D. 19____

Chief Election Officer (County Clerk)

The certificate of results shall be substantially in the following form:

CERTIFICATE OF RESULTS

I, _____, chief election officer (county clerk) of Hawaii (county), do hereby certify that _____ (question) was on the _____ day of _____ 19____, duly adopted (rejected) by a majority of the votes cast.

Chief Election Officer (County Clerk)

If there is an election contest these certificates shall be delivered only after a final determination in the contest has been made and the time for an appeal has expired. [L 1970, c 26, pt of §2; am L 1986, c 305, §4]

§11-157 In case of tie. In case of the failure of an election by reason of the equality of vote between two or more candidates, the tie shall be decided by the chief election officer or county clerk in the case of county elections in accordance with the following procedure:

(1) In the case of an election involving a seat for the senate, house of representatives, board of education, or county council where only voters within a specified district are allowed to cast a vote, the winner shall be declared as follows:

(A) For each precinct in the affected district, an election rate point shall be calculated by dividing the total number of registered voters in that precinct by the total number of registered voters in the district. For the purpose of this subparagraph, the absentee votes cast for the affected district shall be treated as a precinct.

The election rate point shall be calculated by dividing the total absentee votes cast for the affected district by the total number of registered voters in that district. All election rate points shall be expressed as decimal fractions rounded to the nearest hundred thousandth.

- (B) The candidate with the highest number of votes in a precinct shall be allocated the election rate point calculated under subparagraph (A) for that precinct. In the event that two or more persons are tied in receiving the highest number of votes for that precinct, the election rate point shall be equally apportioned among those candidates involved in that precinct tie.
 - (C) After the election rate points calculated under subparagraph (A) for all the precincts have been allocated as provided under subparagraph (B), the election rate points allocated to each candidate shall be tallied and the candidate with the highest election rate point total shall be declared the winner.
 - (D) If there is a tie between two or more candidates in the election rate point total, the candidate who is allocated the highest election rate points from the greatest number of precincts shall be declared the winner.
- (2) In the case of an election involving a federal office or an elective office where the voters in the entire State or in an entire

county are allowed to cast a vote, the winner shall be declared as follows:

- (A) For each representative district in the State or county, as the case may be, an election rate point shall be calculated by dividing the total number of registered voters in that representative district by the total number of registered voters in the State, county, or federal office district, as the case may be; provided that for purposes of this subparagraph:
 - (i) The absentee votes cast for a statewide, countywide, or federal office shall be treated as a separate representative district and the election rate point shall be calculated by dividing the total absentee votes cast for the statewide, countywide, or federal office by the total number of registered voters in the State, county, or federal office district, as the case may be.
 - (ii) The overseas votes cast for any election in the State for a federal office shall be treated as a separate representative district and the election rate point shall be calculated by dividing the total number of overseas votes cast for the affected federal office by the total number of registered voters in the affected federal office district. The term "overseas votes" means those votes

cast by absentee ballots for a presidential election as provided in section 15-3.

All election rate points shall be expressed as decimal fractions rounded to the nearest hundred thousandth.

- (B) The candidate with the highest number of votes in a representative district shall be allocated the election rate point calculated under subparagraph (A) for that district. In the event that two or more persons are tied in receiving the highest number of votes for that district, the election rate point shall be equally apportioned among those candidates involved in that district tie.
- (C) After the election rate points calculated under subparagraph (A) for all the precincts have been allocated as prescribed under subparagraph (B), the election rate points allocated to each candidate shall be tallied and the candidate with the election rate point total shall be declared the winner.
- (D) If there is a tie between two or more candidates in the election rate point total, the candidate who is allocated the highest election rate points from the greatest number of representative districts shall be declared the winner. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1; am L 1990, c 198, §2]

PART I. NOMINATION; DETERMINATION OF CANDIDATES

§12-1 Application of chapter. All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise. [L 1970, c 26, pt of §2]

§12-1.5 REPEALED. L 1980, c 139, §1.

§12-3 Primary held when; candidates only those nominated. The primary shall be held at the polling place for each precinct on the second to the last Saturday of September in every even numbered year; provided that in no case shall any primary election precede a general election by less than forty-five days.

No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(a); am L 1975, c 36, §2(1); am L 1976, c 106, §2(1); am L 1979, c 122, §2; am imp L 1984, c 90, §1]

§12-2.5 Nomination papers; when available. Nomination papers shall be made available from the first working day of February in every even-numbered year; provided that in the case of a special primary or special election, nomination papers shall be made available at least ten days prior to the close of filing. [L 1979, c 133, §7; am L 1990, c 35, §6]

§12-3 Nomination paper: format; limitations. (a) The name of no candidate shall be printed upon any official ballot to be used at any primary, special primary, or special election unless a nomination paper was filed in

the candidate's behalf and in the name by which the candidate is commonly known. The nomination paper shall be in a form prescribed by the chief election officer containing substantially the following information:

- (1) A statement by the registered voters of the district from which the candidate is running signing the form that they are eligible to vote for the candidate at the next election;
- (2) A statement by the registered voters signing the form that they nominate the candidate for the office on the nomination paper;
- (3) The residence address and county in which the candidate resides;
- (4) The name of the candidate and the office for which the candidate is running, which name and office are to be placed on the nomination paper by the chief election officer or the clerk prior to releasing the form to the candidate;
- (5) Space for the names of the registered voters signing the form and their district or districts and precinct or precincts;
- (6) A certification by the candidate that the candidate will qualify under the law for the office the candidate is seeking;
- (7) A certification by a party candidate that the candidate is a member of the party;
- (8) A certification, where applicable, by the candidate that the candidate has complied with the provisions of Article II, section 7, of the Constitution of the State of Hawaii; and

- (9) The name the candidate wishes inserted on the ballot and the post office address of the candidate.

(b) No signatures shall be counted, unless they are upon the nomination paper having the format set forth above, written or printed thereon, and if there are separate sheets to be attached to the nomination paper, the sheets shall have the name of the person and the office for which the candidate is running placed thereon by the chief election officer or the clerk. The nomination paper and separate sheets shall be provided by the chief election officer or the clerk.

(c) Nomination papers shall not be filed in behalf of any person for more than one party or for more than one office; nor shall any person file nomination papers both as a party candidate and as a nonpartisan candidate.

(d) The office for which the candidate is running and the candidate's name may not be changed from that indicated on the nomination paper and separate sheets. If the candidate wishes to run for an office different from that for which the nomination paper states, the candidate may request the appropriate nomination paper from the chief election officer or clerk and have it signed by the required number of voters. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(b); am L 1975, c 36, §2(2); am L 1979, c 139, §6; am L 1980, c 264, §2; am L 1983, c 34, §19]

§12-4 Nomination papers: qualifications of signers. No person shall sign the nomination papers of more than one candidate, partisan or nonpartisan, for the same office, unless there is more than one office in a class in which case no person shall sign papers for more than

the actual number of offices in a class. Nomination papers shall be construed in this regard according to priority of filing, and the name of any person appearing thereon shall be counted only so long as this provision is not violated, and not thereafter.

No name on nomination papers shall be counted, unless the signer is a registered voter, eligible to vote for the candidate at the next election. To determine if the signers are eligible to vote for the candidate, the chief election officer or clerk may use lists prepared in accordance with section 11-24. [L 1970, c 26, pt of §2; am L 1974, c 34, §2(a)]

§12-5 Nomination papers: number of signers. (a) Nomination papers for candidates for members of congress, governor, lieutenant governor, and the board of education shall be signed by not less than twenty-five registered voters of the State or of the congressional district or school board district from which the candidates are running in the case of candidates for the United States House of Representatives or for the board of education.

(b) Nomination papers for candidates for either branch of the legislature and for county office shall be signed by not less than fifteen registered voters of the district or county or subdivision thereof for which the person nominated is a candidate.

(c) Nomination papers for candidates for members of the board of trustees of the office of Hawaiian affairs shall be signed by not less than twenty-five persons registered as prescribed under section 11-15(b).

(d) No signatures shall be required on nomination papers for candidates filing to run in a special primary or special election to fill a vacancy. [L 1970, c 26, pt of §2; am L 1979, c 196, §6; am L 1990, c 35, §7]

§12-6 Nomination papers: time for filing; fees. (a) Nomination papers shall be filed as follows: for members of Congress, state, and county offices, and the board of trustees of the office of Hawaiian affairs, with the chief election officer, or clerk in case of county offices, not later than 4:30 p.m. on the sixtieth calendar day prior to the primary, special primary, or special election provided that if such day is a Saturday, Sunday, or holiday then not later than 4:30 p.m. on the first working day immediately preceding. A state candidate from the counties of Hawaii, Maui, and Kauai may file the declaration of candidacy with the respective clerk. The clerk shall transmit to the office of the chief election officer the state candidate's declaration of candidacy without delay. However, if a special primary or special election is to be held by a county and the county charter requires that the council shall issue a proclamation calling for the election to be held within a specified period of time, and if that requirement would not allow the filing of nomination papers with the appropriate office by the sixtieth calendar day prior to the day for holding the special primary or special election, the council shall establish the deadline for the filing of nomination papers in the proclamation calling for the election.

(b) There shall be deposited with each nomination paper a filing fee on account of the expenses attending the holding of the primary, special primary, or special

election which shall be paid into the treasury of the State, or county, as the case may be, as a realization:

- (1) For United States senators and United States representatives - \$75;
- (2) For governor and lieutenant governor - \$750;
- (3) For mayor - \$500; and
- (4) For all other offices - \$250.

(c) Upon the receipt by the chief election officer or the clerk of the nomination paper of a candidate, the day, hour, and minute when it was received shall be endorsed thereon.

(d) Upon the showing of a certified copy of an affidavit which has been filed with the campaign spending commission pursuant to section 11-208 by a candidate who has voluntarily agreed to abide by spending limits, the chief election officer or clerk shall discount the filing fee of the candidate by the following amounts:

- (1) For the office of governor and lieutenant governor - \$675;
- (2) For the office of mayor - \$450; and
- (3) For all other offices - \$225.

(e) The chief election officer or clerk shall waive the filing fee in the case of a person who declares, by affidavit, that the person is indigent and who has filed a petition signed by currently registered voters who constitute at least one-half of one per cent of the total voters registered at the last preceding general election in the respective district or districts which correspond to the

specific office for which the indigent person is a candidate. This petition shall be submitted on the form prescribed and provided by the chief election officer together with the nomination paper required by this chapter. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(c); am L 1974, c 34, §2(b); am L 1975, c 36, §2(3); am L 1976, c 106, §2(2); am L 1977, c 189, §2(1); am L 1979, c 196, §7 and c 224, §5; am L 1983, c 34, §20]

§12-7 Filing of oath. The name of no candidate for any office shall be printed upon any official ballot, in any election, unless the candidate shall have taken and subscribed to the following written oath or affirmation, and filed the oath with the candidate's nomination papers.

The written oath or affirmation shall be in the following form:

"I, . . . , do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as . . . (name of office) . . . to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God."

Upon being satisfied as to the sincerity of any person claiming that the person is unwilling to take the above prescribed oath only because the person is unwilling to be sworn, the person may be permitted, in lieu of the oath, to make the person's solemn affirmation which shall be in the same form as the oath except that the words "sincerely and truly affirm" shall be substituted for the

word "swear" and the phrases "on oath" and "So help me God" shall be omitted. Such affirmation shall be of the same force and effect as the prescribed oath.

The oath or affirmation shall be subscribed before the officer administering the same, who shall endorse thereon the fact that the oath was subscribed and sworn to or the affirmation was made together with the date thereof and affix the seal of the officer's office or of the court of which the officer is a judge or clerk.

It shall be the duty of every notary public or other public officer by law authorized to administer oaths to administer the oath or affirmation prescribed by this section and to furnish the required endorsement and authentication. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§12-8 Nomination papers: challenge; evidentiary hearings and decisions. (a) All nomination papers filed in conformity with section 12-3 shall be deemed valid unless objection is made thereto by a registered voter, chief election officer or county clerk in writing not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to that election day. An objection in a primary or special election by a registered voter or county clerk shall be filed not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to that primary or special election day. In case objection is made, notice thereof shall be given including the placement of the notice in the mail by registered or certified mail to the candidate objected thereto.

(b) The chief election officer or the clerk in the case of county offices shall have the necessary powers and

authority to reach a preliminary decision on the merits of the objection; provided that nothing in this subsection shall be construed to extend to the candidate a right to an administrative contested case hearing as defined in section 91-1(5). The chief election officer or the clerk in the case of county offices shall render a preliminary decision not later than five working days after the objection is filed.

(c) If the chief election officer or clerk in the case of county offices determines that the objection may warrant the disqualification of the candidate, the chief election officer or clerk shall file a complaint in the circuit court for a determination of the objection; provided that such complaint shall be filed with the clerk of the circuit court not later than 4:30 p.m. on the seventh working day after the objection was filed.

(d) If the chief election officer or clerk in the case of county offices files a complaint in the circuit court the circuit court clerk shall issue to the defendants named in the complaint a summons to appear before the court not later [than] 4:30 p.m. on the fifth day after service thereof.

(c) The circuit court shall hear the complaint in a summary manner and at the hearing the court shall cause the evidence to be reduced to writing and shall not later than 4:30 p.m. on the fourth day after the return give judgment fully stating all findings of fact and of law. The judgment shall decide the objection presented in the complaint, and a certified copy of the judgment shall forthwith be served on the chief election officer or the clerk, as the case may be.

(f) If the judgment disqualifies the candidate, the chief election officer or the clerk shall follow the procedures set forth in sections 11-117 and 11-118 regarding the disqualifications of candidates.

(g) If an objection is made to the nomination papers of any candidate for the office of lieutenant governor pursuant to this section, the incumbent lieutenant governor shall be excused and the attorney general shall execute this section. The attorney general shall render a preliminary decision not later than five working days after the objection is filed. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(d); am L 1975, c 36, §2(4); am L 1977, c 189, §2(2); am L 1990, c 125, §1]

§12-9. List of candidates. As soon as possible but not later than 4:30 p.m. on the fifth day after the close of filing the chief election officer shall transmit to each county clerk and the county clerk shall transmit to the chief election officer certified lists containing the names of all persons, the office for which each is a candidate, and their party designation, or designation of nonpartisanship, as the case may be, for whom nomination papers have been duly filed in his office and who are entitled to be voted for at the primary, special primary or special election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(e)]

PART II. BALLOTS

§12-21 Official party ballots. The primary or special primary ballot shall be clearly designated as such. The names of the candidates of each party qualifying under section 11-61 or 11-62 and of nonpartisan candidates may be printed on separate ballots, or on a single ballot. The name of each party and the nonpartisan designation shall be distinctly printed and sufficiently separate from each other. The names of all candidates shall be printed on the ballot as provided in section 11-115. When the names of all candidates of the same party for the same office exceed the maximum number of voting positions on a single side of a ballot card, the excess names may be arranged and listed on both sides of the ballot card and additional ballot cards if necessary. When separate ballots for each party are not used, the order in which parties appear on the ballot, including nonpartisan, shall be determined by lot.

The chief election officer or the county clerk, in the case of county elections, shall approve printed samples or proofs of the respective party ballots as to uniformity of size, weight, shape, and thickness prior to final printing of the official ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(f); am L 1979, c 139, §7; am L 1981, c 214, §1; am L 1987, c 232, §2]

§12-22 Official nonpartisan ballots. There shall be only one primary or special primary ballot containing the names of all nonpartisan candidates to be voted for and the offices for which they are candidates. The ballot shall be clearly designated as the nonpartisan primary or special primary ballot and shall conform in all other respects

to the requirements relative to official party ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(g); am L 1979, c 139, §8]

PART III. BALLOT SELECTION

§12-31 Selection of party ballot; voting. No person eligible to vote in any primary or special primary election shall be required to state a party preference or nonpartisanship as a condition of voting. Each voter shall be issued the primary or special primary ballot for each party and the nonpartisan primary or special primary ballot. A voter shall be entitled to vote only for candidates of one party or only for nonpartisan candidates. If the primary or special primary ballot is marked contrary to this paragraph, the ballot shall not be counted.

In any primary or special primary election in the year 1979 and thereafter, a voter shall be entitled to select and to vote the ballot of any one party or nonpartisan, regardless of which ballot the voter voted in any preceding primary or special primary election. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(i); am L 1974, c 34, §2(c); am L 1979, c 139, §9; am imp L 1984, c 90, §1]

PART IV. ELECTION RESULTS

§12-41 Result of election. (a) The person or persons receiving the greatest number of votes at the primary or special primary as a candidate of a party for an office shall be the candidate of the party at the following general or special general election but not more candidates for a party than there are offices to be elected; provided

that any candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall, after the primary or special primary election, be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.

(b) Any nonpartisan candidate receiving at least ten per cent of the total votes cast for the office for which the person is a candidate at the primary or special primary, or a vote equal to the lowest vote received by the partisan candidate who was nominated in the primary or special primary, shall also be a candidate at the following election; provided that when more nonpartisan candidates qualify for nomination than there are offices to be voted for at the general or special general election, there shall be certified as candidates for the following election those receiving the highest number of votes, but not more candidates than are to be elected. [L 1970, c 26, pt of §2; am L 1973, c 217, §2(j); am L 1979, c 139, §10; am L 1983, c 34, §21]

§12-42 Unopposed candidates declared elected. (a) Any candidate running for any office in the State of Hawaii in a special election or special primary election who is the sole candidate for that office shall, after the close of filing of nomination papers, be deemed and declared to be duly and legally elected to the office for which the person is a candidate. The term of office for a candidate elected under this subsection shall begin

respectively on the day of the special election or on the day of the immediately succeeding special general election.

(b) Any candidate running for any office in the State of Hawaii in a special general election who was only opposed by a candidate or candidates running on the same ticket in the special primary election and is not opposed by any candidate running on any other ticket, nonpartisan or otherwise, and is nominated at the special primary election shall, after the special primary, be deemed and declared to be duly and legally elected to the office for which the person is a candidate at the special primary election regardless of the number of votes received. The term of office for a candidate elected under this subsection shall begin on the day of the special general election. [L 1974, c 34, §2(d); am L 1985, c 203, §6]

PART I. GENERAL PROVISIONS

§16-1 Voting systems authorized. The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.

Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election,

in one or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12. [L 1970, c 26, pt of §2]

§16-2 Voting system requirements. All voting systems adopted under this chapter by the chief election officer or the legislature shall satisfy the following requirements:

- (1) It shall secure to the voter secrecy in the act of voting;
- (2) It shall provide for voting for all candidates of as many political parties as may make nominations, nonpartisans, and for or against as many questions as are submitted;
- (3) It shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions. [L 1970, c 26, pt of §2]

PART II. VOTING MACHINE SYSTEM

§16-11 Definitions. "Protective counter" means an apparatus built into the voting machine which cannot be reset, which records the total movement of the operating lever.

"Voting machine system" means the method of electrically, mechanically, or electronically recording and counting votes upon being cast. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(2)]

Revision Note

Definitions rearranged.

§16-12 Voting machines; requirements. No voting machine shall be installed for use in any election in the State unless it shall satisfy the following requirements:

- (1) It shall permit the voter to vote for as many persons for an office as the voter is lawfully entitled to vote for, but no more;
- (2) It shall prevent the voter from voting for the same persons more than once for the same office;
- (3) It shall permit the voter to vote for or against any question the voter may have the right to vote on, but no other;
- (4) In special primary and primary elections it shall be so equipped that it will lock out all rows except those of the party or nonpartisan candidates selected by the voter;
- (5) It shall be provided with a protective counter or protective device whereby any operation of the machine before or after the election will be detected;
- (6) It shall be provided with a counter which shall show at all times during an election how many persons have voted;
- (7) It shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(a); am L 1980, c 64, §5(a); am imp L 1984, c 90, §1]

PART III. PAPER BALLOT VOTING SYSTEM

§16-21 Definition. "Paper ballot voting system" means the method of recording votes which are counted manually. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(4)]

§16-22 Marking. The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting by paper ballot. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

§16-23 Paper ballot; voting. Upon receiving the ballot the voter shall proceed into one of the voting booths provided for the purpose, and shall mark the voter's ballot in the manner prescribed by section 16-22.

The voter shall then leave the booth and deliver the ballot to the precinct official in charge of the ballot boxes. The precinct official shall be sufficiently satisfied that there is but one ballot enclosed, whereupon the ballot shall be immediately dropped into the proper box by the precinct official. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(b); am L 1977, c 189, §4; am imp L 1984, c 90, §1]

§16-24 Count, public. Insofar as the limits of the room in which the voting takes place reasonably allow, no person shall be prevented from attending the counting of the ballots on election day, unless it is necessary to preserve the peace. [L 1970, c 26, pt of §2]

§16-25 Order and method of counting. Each ballot shall be counted and finished as to all the candidates thereon before counting a second and subsequent ballots.

Except as provided in section 11-71, the ballots shall be counted by teams in the following manner only: by one precinct official announcing the vote in a loud clear voice, one precinct official tallying the vote, one precinct official watching the precinct official announcing the vote and one precinct official watching the precinct official tallying the vote. The precinct official doing the announcing or tallying and the precinct official watching him shall not be of the same political party. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(c)]

§16-26 Questionable ballots. A ballot shall be questionable if:

- (1) A ballot contains any mark or symbol whereby it can be identified, or any mark or symbol contrary to the provisions of law; or
- (2) Two or more ballots are found in the ballot box so folded together as to make it clearly evident that more than one ballot was put in by one person, the ballots shall be set aside as provided below.

Each ballot which is held to be questionable shall be endorsed on the back by the chairman of precinct officials with the chairman's name or initials, and the word "questionable". All questionable ballots shall be set aside uncounted and disposed of as provided for ballots in section 11-154. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(d); am imp L 1984, c 90, §1]

§16-27 Number of blank and questionable ballots; record of. In addition to the count of the valid ballots, the precinct official shall, as to each separate official ballot, also determine and record the number of totally blank

ballots and the number of questionable ballots. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(c)]

§16-28 Declaration of results. When the precinct officials have ascertained the number of votes given for each candidate they shall make public declaration of the whole number of votes cast, the names of the persons voted for, and the number of votes for each person. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(f)]

§16-29 Tally sheets. The tally sheets used in counting the ballots cast shall be marked and handled in a secure fashion prescribed in rules and regulations promulgated by the chief election officer in accordance with chapter 91. [L 1970, c 26, pt of §2]

* * *

CHAPTER 17 [NEW] VACANCIES

§17.1 United States senator. When a vacancy occurs in the office of United States senator the vacancy shall be filled for the unexpired term at the following state general election, provided that the vacancy occurs not later than 4:30 p.m. on the sixtieth day prior to the primary for nominating candidates to be voted for at the election; otherwise at the state general election next following. The chief election officer shall issue a proclamation designating the election for filling vacancy. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy and shall be a registered member of the same political party as the senator causing the vacancy. All candidates for the unexpired term shall be nominated

and elected in accordance with this title. [L 1970, c 26, pt of §2; am L 1973, c 217, §7(a)]

§17-2 United States representative. When a vacancy occurs in the representation of this State in the United States House of Representatives, the chief election officer shall issue a proclamation for an election to fill the vacancy. The proclamation shall be issued not later than on the sixtieth day prior to the election to fill the vacancy and shall contain the date, time, and places where the special election is to be held, the time within which nomination papers shall be filed, the time for transmitting to county clerks the notice designating the offices for which candidates are to be elected, the time for transmitting to county clerks lists of candidates to be voted for at the special election and such other matter as provided for in section 11-91 and which are not inconsistent with this section. The special election shall be conducted and the results ascertained so far as practicable, in accordance with this title. [L 1970, c 26, pt of §2; am L 1973, c 217, §7(b); am L 1974, c 34, §4(a); am imp L 1984, c 90, §1; am L 1986, c 305, §6]

§17-3 State senator. (a) Whenever any vacancy in the membership of the state senate occurs, the term of which ends at the next succeeding general election, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

(b) In the case of vacancy, the term of which does not end at the next succeeding general election:

- (1) If it occurs not later than on the tenth day prior to the close of filing for the next succeeding primary election, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. All candidates for the unexpired term shall be nominated and elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.
- (2) If it occurs later than on the tenth day prior to the close of filing for the next succeeding primary election but not later than on the sixtieth day prior to the next succeeding primary election, or if there are no qualified candidates for any party or nonpartisan candidates qualified for the primary election ballot, nominations for the unexpired term may be filed not later than 4:30 p.m. on the fiftieth day prior to the next succeeding primary election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill the vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.

- (3) If it occurs after the sixtieth day prior to the next succeeding primary but not later than on the fiftieth day prior to the next succeeding general election, or if there are no qualified candidates for any party or nonpartisan candidates in the primary, the vacancy shall be filled for the unexpired term at the next succeeding general election. The chief election officer shall issue a proclamation designating the election for filling the vacancy. Party candidates for the unexpired senate term shall be nominated by the county committees of the parties not later than 4:30 p.m. on the fortieth day prior to the general election; nonpartisan candidates may file nomination papers for the unexpired term not later than 4:30 p.m. on the fortieth day prior to the general election with the nonpartisan candidate who is to be nominated to be decided by lot, under the supervision of the chief election officer. The candidates for the unexpired term shall be elected in accordance with this title. Pending the election the governor shall make a temporary appointment to fill the vacancy and the person so appointed shall serve until the election of the person duly elected to fill such vacancy. The appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds.
- (4) If it occurs after the fiftieth day prior to the next succeeding general election or if no candidates are nominated, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party or nonpartisanship as the person the appointee succeeds. [L 1970, c 26, pt of §2; am L 1973, c 217, §7(c); am L 1980, c 247, §2; am imp L 1984, c 90, §1; am L 1990, c 35, §2]

§17-4 State representatives. Whenever any vacancy in the membership of the state house of representatives occurs, the governor shall make an appointment to fill the vacancy for the unexpired term and the appointee shall be of the same political party as the person the appointee succeeds. [L 1970, c 26, pt of §2; am imp L 1984, c 90, §1]

* * *

[In 1986, the Hawaii Legislature amended sections 11-61, 11-62, and 11-63, of the Hawaii Revised Statutes. The following is, in its entirety, Hawaii House Standing Committee Report No. 762-86, *reprinted from* 1986 Haw. H.J. 1370, which explains the origins and purpose of the bill that became law in 1986.]

SCRep. 762-86 Judiciary on H.B. No. 303

The purpose of this bill is to amend the requirements by which a political party qualifies and remains qualified to appear on the ballot in State elections.

The bill provides that a party may qualify by petition as well as by election result. The bill further provides that if a party qualifies through petition for three consecutive general elections, it will be deemed a political party for the following ten year period.

Your Committee heard testimony in support of the bill from the Lieutenant Governor and the Libertarian Party of Hawaii. The Libertarian Party testified that it is sometimes difficult to field a sufficient number of candidates to remain qualified as a party and further that the percentage of votes required to remain qualified is among the highest in the nation.

Your Committee finds that qualifying by petition is an acceptable alternative to qualifying by election results which is a continuous process.

Your Committee amended the bill to delete the provision that parties previously qualified under section 11-61, HRS, requalify after the bill is passed. Your Committee believes that parties presently qualified should not have to immediately requalify.

Your Committee further amended the bill to require that a party who qualifies by petition continue to field candidates for political office during the ten year period following qualification. Your Committee believes that the party must continue to field candidates in order to remain a viable party.

Your Committee also made certain technical, nonsubstantive amendments for style and clarity.

Your Committee on Judiciary is in accord with the intent and purpose of S.B. No. 303, S.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 303, S.D. 1, H.D. 1, and be placed on the calendar for Third Reading.

Signed by all members of the Committee.

* * *

[At the general election of 1988, Article III, § 4 of the Hawaii Constitution of 1978 was amended to read as follows:]

ELECTION OF MEMBERS; TERM

Section 4. Each member of the legislature shall be elected at an election. If more than one candidate has been nominated for election to a seat in the legislature, the member occupying that seat shall be elected at a general election. If a candidate nominated for a seat at a primary election is unopposed for that seat at the general election the candidate shall be deemed elected at the primary election. The term of office of a member of the house of representatives shall be two years and the term of office of a member of the senate shall be four years. The term of a member of the legislature shall begin on the day of the general election at which elected or if elected at a primary election on the day of the general election immediately following the primary election at which elected. For a member of the house of representatives, the term shall end on the day of the general election immediately following the day the member's term commences. For a member of the senate, the term shall end on the day of the second general election immediately following the day the member's term commences. [Ren Const Con 1978 and election Nov 7, 1978; am HB 572 (1987) and election Nov 8, 1988]

APPENDIX "B"
LAWS
OF
HER MAJESTY LILIUOKALANI
QUEEN OF THE HAWAIIAN ISLANDS,
PASSED BY THE
LEGISLATIVE ASSEMBLY
AT ITS SESSION
1892.

Printed by Order of the Government

LAWS
OF THE
PROVISIONAL GOVERNMENT
OF THE
HAWAIIAN ISLANDS,
PASSED BY THE
EXECUTIVE AND ADVISORY COUNCILS.

ACTS 1 TO 86.

CHAPTER LXXIX.

AN ACT

TO AMEND SECTIONS 22, 47, 49, 56, 75, AND SUB-SECTIONS 1 AND 3 OF SECTION 108 OF CHAPTER LXXXVI. OF THE SESSION LAWS OF 1890, OTHERWISE KNOWN AS THE "ELECTION LAW".

Be it Enacted by the Queen and the Legislature of the Hawaiian Kingdom:

SECTION 1. Section 22 of Chapter LXXXVI. of the Session Laws of 1890, is hereby amended so as to read as follows:

"Section 22. No person shall be eligible for election, or shall be permitted to hold a seat as a member of the Hawaiian Legislature, either as a Noble or as a Representative, who shall be under any of the disqualifications mentioned in Section 25, or elsewhere in this Act; or who shall hold any office or offices of trust or profit under any department of the Government; or who shall have any direct pecuniary interest in any contract or contracts with the Government or any department thereof.

"No member of the Legislature shall during the term for which he was elected, be appointed to any civil office under the Government, unless such office carries with it the right to a seat in the Legislature."

SECTION 2. Section 47 of the said Act is hereby amended so as to read as follows:

"Section 47. No person shall be permitted to stand as a candidate for election unless he shall be so requested in writing, signed by not less than twenty-five duly qualified electors of the district in which such election is

ordered; which request shall be deposited with the Minister of the Interior not less than twenty-one days before the day of such election; except on the Island of Oahu, where such request shall be deposited not less than seven days before the day of such election, together with a fee of twenty-five dollars for a candidate for Representative, and fifty dollars for a candidate for Noble on account of the expenses attending the election, which amounts shall be paid into the Treasury as a Government realization.

"Any candidate may withdraw before an election by giving notice to the Minister of the Interior in writing; and if such notice of withdrawal on the part of any candidate be filed in the Interior Office before the printing of the ballots, the fee previously deposited with his application shall be returned to him.

"If such notice of withdrawal shall not be given before the printing of the ballots, as prescribed in Section 58, the inspectors of Election shall, upon receiving due notice of such withdrawal from the Minister of the Interior, efface by suitable means such name from the ballots before distributing the same to individual voters.

"Provided, however, that in case of the withdrawal or decease of a candidate, a new nomination to fill such vacancy and a new application to the Minister of the Interior may be made irrespective of the aforesaid limit of time, and in such case the law governing the construction of application papers and fee to be deposited with the same, shall hold good."

SECTION 3. Section 49 of the said Act is hereby amended so as to read as follows:

"Section 49. Within ten days following an election each candidate shall furnish to the Minister of the Interior an itemized statement of his expenses as candidate for election, which statement shall be sworn to and shall be open to the inspection of any one.

"Provided, however, that if a candidate has incurred no expenses on account of such election, he shall be held liable to fine if he shall not furnish the Minister of the Interior with a sworn statement to that effect. The fine shall be the same as provided for a failure to furnish a statement of expenses when any are incurred.

"The expenses to be legally incurred by or for a candidate for election of Noble or Representative, or member of Road Board, shall be:

- "1. His personal expenses as a candidate.
- "2. Expenses of printing and advertising.
- "3. Cost of stationery and postage.
- "4. Expenses of public meetings.
- "5. Rent and supplies of committee rooms, not to exceed one for each polling place."

SECTION 4. Section 56 of the said Act is hereby amended so as to read as follows:

"Section 56. The ballot for Representatives shall be of white paper and the ballot for Nobles of blue paper. Specimen ballots shall be of white or blue paper. The paper shall be of uniform weight, thickness, and of the same sizing color. It shall bear no word, motto, device, sign or symbol other than allowed by this Section, and

shall be so printed that the type shall not show a trace on the back. Besides the name or names of candidates to be voted for, it shall contain only the words as follows:

"(General or Special) Election for the year. . . . Name and period of the office to be filled.

"Name of the division for Nobles, or the name of the District for Representatives printed in English and Hawaiian. The names of the several candidates may be printed, if English, with the Hawaiian equivalent, if Hawaiian, with English equivalent, if such exist.

"Between each name and its equivalent and the next name a horizontal line shall be ruled; and immediately after all the names a vertical line shall be ruled, enclosing a rectangular space in continuation of each name and its equivalent in which the cross mark is to be placed in voting."

SECTION 5. Section 75 of the said Act is hereby amended by having a new sub-section introduced as follows, which new sub-section shall be numbered 5:

"5. In cases where general and special elections are held at the same time and are incorporated upon the same ballot if the provisions of sub section 1 be violated in one or more of the several elections thus held upon one ballot; the whole ballot shall not be considered as invalid, but only the election or elections special or general in which such violation occurs.

SECTION 6. Sub-sections 1 and 3 of Section 108 of the said Act are hereby amended so as to read as follows:

"1. The voter is to vote for one candidate for Representative. The voter is to vote for

..... candidates for Nobles, 6 years.

..... candidates for Nobles, 4 years;

..... candidates for Nobles, 2 years.

"3. Immediately upon receiving his folded ballot or ballots from the appointed officer the voter must go into one of the compartments, and with the pencil there provided, mark a cross on the ballot in the rectangular space thereon provided in continuation of the name of the candidate for whom he wishes to vote, thus, X."

Approved this 3d day of January, A. D. 1893.

LILIUOKALANI R.

BY THE QUEEN:

G. N. WILCOX,

Minister of the Interior.

PROCLAMATION.

In its earlier history Hawaii possessed a Constitutional Government honestly and economically administered in the public interest.

The Crown called to its assistance as advisers able, honest and conservative men whose integrity was unquestioned even by their political opponents.

The stability of the Government was assured, armed resistance and revolution unthought of, popular rights were respected and the privileges of the subject from time

to time increased and the prerogatives of the Sovereign diminished by the voluntary acts of the successive Kings.

With very few exceptions this state of affairs continued until the expiration of the first few years of the reign of His late Majesty Kalakaua. At this time a change was discernable in the spirit animating the chief executive and in the influences surrounding the Throne. A steadily increasing disposition was manifested on the part of the King to extend the Royal prerogatives; to favor adventurers and persons of no character or standing in the community; to encroach upon the rights and privileges of the people by steadily increasing corruption of electors, and by means of the power and influence of office holders and other corrupt means to illegitimately influence the elections, resulting in the final absolute control of not only the executive and legislative, but to a certain extent the judicial departments of the government, in the interest of absolutism.

This finally resulted in the revulsion of feeling and popular uprising of 1887 which wrested from the King a large portion of his ill-gotten powers.

The leaders of this movement were not seeking personal aggrandizement, political power or the suppression of the native government. If this had been their object it could easily have been accomplished, for they had the absolute control of the situation.

Their object was to secure responsible government through a representative Cabinet, supported by and responsible to the people's elected representatives. A clause to this effect was inserted in the Constitution and

subsequently enacted by law by the Legislature, specifically covering the ground that in all matters concerning the State the Sovereign was to act by and with the advice of the Cabinet and only by and with such advice.

The King willingly agreed to such proposition, expressed regret for the past, and volunteered promises for the future.

Almost from the date of such agreement and promises up to the time of his death, the history of the Government has been a continual struggle between the King on the one hand and the Cabinet and the Legislature on the other, the former constantly endeavoring by every available form of influence and evasion to ignore his promise and agreements and regain his lost powers.

This conflict upon several occasions came to a crisis, followed each time by submission on the part of His Majesty by renewed expressions of regret and promises to abide by the constitutional and legal restrictions to the future. In each instance such promise was kept until a further opportunity presented itself, when the conflict was renewed in defiance and regardless of all previous pledges.

Upon the accession of Her Majesty Liliuokalani, for a brief period the hope prevailed that a new policy would be adopted. This hope was soon blasted by her immediately entering into conflict with the existing Cabinet, who held office with the approval of a large majority of the Legislature, resulting on the triumph of the Queen and the removal of the Cabinet. The appointment of a new Cabinet subservient to her wishes and their continuance in office until a recent date gave no opportunity for

further indication of the policy which would be pursued by Her Majesty until the opening of the Legislature in May of 1892.

The recent history of that session has shown a stubborn determination on the part of Her Majesty to follow the tactics of her late brother, and in all possible ways to secure an extension of the royal prerogatives and an abridgment of popular rights.

During the latter part of the session, the Legislature was replete with corruption; bribery and other illegitimate influences were openly utilized to secure the desired end, resulting in the final complete overthrow of all opposition and the inauguration of a Cabinet arbitrarily selected by Her Majesty in complete defiance of constitutional principles and popular representation.

Notwithstanding such result the defeated party peacefully submitted to the situation.

Not content with her victory, Her Majesty proceeded on the last day of the session to arbitrarily arrogate to herself the right to promulgate a new Constitution, which proposed among other things to disfranchise over one-fourth of the voters and the owners of nine-tenths of the private property of the Kingdom, to abolish the elected upper House of the Legislature and to substitute in place thereof an appointive one to be appointed by the Sovereign.

The detailed history of this attempt and the succeeding events in connection therewith is given in the report of the Committee of Public Safety to the citizens of Honolulu and the Resolution adopted at the Mass Meeting

held on the 16th inst., the correctness of which report and the propriety of which resolution is hereby specifically affirmed.

The constitutional evolution indicated has slowly and steadily, though reluctantly and regretfully, convinced an overwhelming majority of the conservative and responsible members of the community that independent, constitutional, representative and responsible government, able to protect itself from revolutionary uprisings and royal aggression is no longer possible in Hawaii under the existing system of government.

Five uprisings or conspiracies against the Government have occurred within five years and seven months. It is firmly believed that the culminating revolutionary attempt of last Saturday will, unless radical measures are taken, wreck our already damaged credit abroad and precipitate to final ruin our already overstrained financial condition; and the guarantees of protection to life, liberty and property will steadily decrease and the political situation grow rapidly worse.

In this belief, and in the firm belief that the action hereby taken is and will be for the best personal, political and property interests of every citizen of the land.

We, citizens and residents of the Hawaiian Islands, organized and acting for the public safety and the common good, hereby proclaim as follows:

1. The Hawaiian Monarchical system of Government is hereby abrogated.

2. A Provisional Government for the control and management of public affairs and the protection of the

public peace is hereby established, to exist until terms of union with the United States of America have been negotiated and agreed upon.

3. Such Provisional Government shall consist of an Executive Council of four members, who are hereby declared to be

S. B. DOLE,
J. A. KING,
P. C. JONES,
W. O. SMITH,

who shall administer the Executive Departments of the Government, the first named acting as President and Chairman of such Council and administering the Department of Foreign Affairs, and the others severally administering the Departments of Interior, Finance and Attorney-General, respectively, in the order in which they are above enumerated, according to existing Hawaiian Law as far as may be consistent with this Proclamation; and also of an Advisory Council which shall consist of fourteen members who are hereby declared to be

S. M. DAMON,	A. BROWN,
L. A. THURSTON,	J. F. MORGAN,
J. EMMELUTH,	H. WATERHOUSE,
J. A. McCANDLESS,	E. D. TENNY,
F. W. McCHESNEY,	F. WILHELM,
W. R. CASTLE,	W. G. ASHLEY,
W. C. WILDER,	C. BOLTE.

Such Advisory Council shall also have general legislative authority.

Such Executive and Advisory Councils shall, acting jointly, have power to remove any member of either Council and to fill such or any other vacancy.

4. All officers under the existing Government are hereby requested to continue to exercise their functions and perform the duties of their respective offices, with the exception of the following named persons:

QUEEN LILIUOKALANI,
CHARLES B. WILSON, MARSHAL,
SAMUEL PARKER, Minister of Foreign Affairs,
W. H. CORNWELL, Minister of Finance,
JOHN F. COLBURN, Minister of the Interior,
ARTHUR P. PETERSON, Attorney-General,
who are hereby removed from office.

5. All Hawaiian Laws and Constitutional principles not inconsistent herewith shall continue in force until further order of the Executive and Advisory Councils.

(Signed) HENRY E. COOPER,
(Chairman),
ANDREW BROWN,
JOHN EMMELUTH,
ED. SUHR,
W. C. WILDER,
WM. O. SMITH,
WM. R. CASTLE,
THEODORE F. LANSING,
C. BOLTE,
HENRY WATERHOUSE,
F. W. McCHESNEY,
LORRIN A. THURSTON,
J. A. McCANDLESS,
Committee of Safety.

HONOLULU, H. I., JANUARY 17TH, 1893.

APPENDIX "C"

Article I, § 4, clause 1 of the Constitution provides that:

The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]

Article II, § 1, clause 2 of the Constitution provides that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]

The Tenth Amendment to the Constitution provides that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director
of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Gov-
ernor of Hawaii; BENJAMIN
CAYETANO, in his capacity
as Lieutenant Governor of
the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Mary Blaine Johnston
90 Central Avenue
Wailuki, Maui, Hawaii 96793
(808) 244-8750

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

(*Counsel continued on inside cover*)

Paul W. Kahn
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4846

Lawrence G. Sager
Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6100

Alan B. Burdick
920 Mililani Street, Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	4
I. RESPONDENTS' CONCEPTION OF VOTING ERRONEOUSLY DIS- COUNTS THE EXPRESSIVE AS- PECTS OF ELECTORAL PARTICI- PATION	4
II. HAWAII'S TOTAL BAN AGAINST WRITE-IN VOTING IS NOT "NECES- SARY" TO THE ADVANCEMENT OF ANY INTERESTS PROFFERED BY THE STATE IN SUPPORT OF ITS POLICY	9
A. The Interest In Protecting Against Unrestrained Factionalism	9
B. The Interest In Protecting The In- tegrity Of The Party's Primary Elections	11
C. The Interest In Protecting The Po- litical Party Mandate And In Elim- inating Uncontested Elections	12
D. The Interest In Voter Education And In Protecting Against Vacan- cies	12

	<i>Page</i>
E. The Interest In Preventing Corruption	13
III. THIS CASE PRESENTS AN APPROPRIATE CHALLENGE TO HAWAII'S TOTAL PROHIBITION OF WRITE-IN VOTING	14
CONCLUSION	17

TABLE OF AUTHORITIES	
	<i>Page</i>
Cases	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	1, 6
<i>Board of Airport Comm. of the City of Los Angeles v. Jews for Jesus</i> , 482 U.S. 569 (1987)	15
<i>Cornelius v. NAACP Legal Defense and Education Fund</i> , 473 U.S. 788 (1985)	8
<i>Dixon v. Maryland State Board</i> , 878 F.2d 776 (4th Cir. 1989)	5
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	14
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989)	1, 6
<i>Illinois Election Board v. Socialist Workers Party</i> , 440 U.S. 173 (1979)	6
<i>Luther v. Borden</i> , 48 U.S. (7 How.) 1 (1849)	5
<i>Norman v. Reed</i> , ___ U.S. ___, 112 S.Ct. 698 (1992)	1
<i>Oughton v. Black</i> , 61 A. 346 (Pa. 1905)	9
<i>Rust v. Sullivan</i> , ___ U.S. ___, 111 S.Ct. 1759 (1991)	8

	<i>Page</i>
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	9
<i>Tashjian v. Republican Party</i> <i>of Connecticut</i> , 479 U.S. 208 (1986)	1, 12

Statute

Haw. Rev. Stat. §12-41(a)	11
---------------------------------	----

Other Authorities

N.Y. Times, Feb. 19, 1992	5
N.Y. Times, Feb. 20, 1992	4

INTRODUCTION

The issue in this case is whether the total ban on write-in voting enforced by Hawaii -- an absolute prohibition that only three other states impose¹ -- can survive constitutional scrutiny under the First and Fourteenth Amendments. Respondents characterize this as a dispute about "ballot access." Petitioner believes that this characterization is unduly narrow and, as explained more fully in our opening brief, implausibly ignores the independent right of voters to express their true political preferences through the exercise of a meaningful franchise. While disagreeing with its result, petitioner agrees with the Ninth Circuit that this case is governed by the analytic framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Properly applied, however, that analysis compels reversal of the decision below.

Under *Anderson*, a court that is called upon to review a statute or policy restricting electoral participation must engage in a three-step inquiry. First, it must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Id.* at 789. Second, it must "evaluate the precise interests put forward by the State as justifications for the burdens" imposed. *Id.* Third, it must consider the "legitimacy" and "strength" of those interests as well as the "extent to which those interests make it necessary to burden plaintiff's rights." *Id.* Moreover, the cases following *Anderson* make clear that once a reviewing court finds that a statute or policy substantially burdens rights of electoral participation, it must inquire whether the restrictions imposed are "narrowly tailored" in the pursuit of "compelling governmental interests." *Norman v. Reed*, ___ U.S. ___, 112 S.Ct. 698, 705 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989); and *Tashjian v. Republican*

¹ Pet.Br. at 8, n.5.

Party of Connecticut, 479 U.S. 208, 222 (1986).

Petitioner's opening brief demonstrated how and why Hawaii's policy seriously burdens the ability of voters to express in a formal way their dissatisfaction with the officially designated candidates for a particular office. By banning all write-in votes, Hawaii has effectively told those voters to stay home. The burden that this policy imposes on the right to vote is absolute. And it is obviously more severe than in states where write-in voting is circumscribed by more specific and narrowly confined regulatory measures. Those other measures are not at issue in this case. Hawaii's total ban is.

Given the "character and magnitude" of the burdens created by Hawaii's total ban, the state must demonstrate that its policy is "narrowly" drawn to advance interests of compelling importance. This showing has not been made and cannot be made. Hawaii's total prohibition of all write-in voting in all elections and in all circumstances reaches far more broadly than "necessary" to advance any of the state's proffered justifications.

In an effort to minimize the nature of petitioner's injury, respondents argue that the act of voting in a democratic society serves only as a means of choosing a potential officeholder among candidates listed on the ballot where the choice can "effect a legal transfer of power" in the immediate election. (Resp.Br. at 27). Accordingly, respondents insist that no serious constitutional concern arose when, in the 1986 election for the State House of Representative seat in his district, Burdick was given a ballot with only one candidate and when he was told that he could vote only for that candidate -- whose views he found unacceptable -- or not vote at all.²

² The ballot offered petitioner in 1986 containing the names of a single candidate for petitioner's legislative district was not unusual. In the 1986 general election in Hawaii, 33% of the elections for state leg-

(continued...)

Respondents' narrow conception of the franchise is critical to their argument.³ But, it is a conception that ultimately reduces the complex act of voting to its most narrow instrumental function. It simply defies reality to argue, as respondents do, that voting involves no expressive activity worthy of any constitutional attention whatever unless such expression is directed in support of one of the candidates listed on the ballot. These matters are amplified in Point I below.

In further defense of Hawaii's policy, respondents suggest a series of interests that are advanced by the policy at issue here. In so doing, respondents never really ask whether the total prohibition against all write-in voting is "necessary" or "narrowly tailored" to the pursuit of these interests. Such an inquiry would be fatal to respondents' position. This argument is addressed in Point II.

Finally, respondents suggest erroneously that the instant case involves only a facial challenge to Hawaii's

² (...continued)

islative offices involved contests where a single candidate ran unopposed. (J.A.272-80). In the 1984 general election 39% of all state legislative races involved candidates running unopposed. (J.A.258-66). And in the 1982 general election 37.5% of the state legislative races were uncontested. (J.A.244-52).

³ Respondents' view that voting is limited to the act of choosing a potential officeholder from among those candidates listed on the ballot leads them to conclude that the rights of voters are inseparable and indistinguishable from the rights of candidates. This, in turn, leads respondents to characterize this case as little more than a candidate's ballot access controversy where broad deference to the state's regulation should be conferred unless it can be shown that the state's laws "freeze the political status quo," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), such that it is 'virtually impossible,' *Williams v. Rhodes*, 393 U.S. 23, 24 (1968), for dissidents to be counted." (Resp.Br. at 26). Because this contention largely misses the point of petitioner's claim, this Court need not resolve whether Hawaii's ballot access laws are, in fact, as liberal as respondents assert. (Resp.Br. at 20-21).

policy; that petitioner can, therefore, only prevail upon a showing that the policy is unconstitutional in all its potential applications; and that petitioner can make no such showing here. Respondents further suggest that a reversal of the decision below would upset the election laws in some thirty states. These arguments by the state are wrong at every turn, as will be explained in Point III below.

ARGUMENT

I. RESPONDENTS' CONCEPTION OF VOTING ERRONEOUSLY DISCOUNTS THE EXPRESSIVE ASPECTS OF ELECTORAL PARTICIPATION

In an effort to diminish or avoid the "character and magnitude" of the burdens posed by Hawaii's total prohibition of write-in ballots, respondents adopt a narrow conception of the act of voting. According to respondents, the only important value of the right to vote is the capacity of the voter, if he or she is lucky enough to be joined by a sufficient number of like-minded voters, "to effect a legal transfer of power" to the candidate of their choice. (Resp.Br. at 27). The idea that the only reason for a citizen to cast a vote, and that the only reason for a democracy to value elections, lies in the choice of the next officeholder is indefensibly narrow. Never an accurate characterization of what actually goes on in a democracy, its flaws are especially apparent in this electoral season.

Consider the 37% of Republican voters who, in the New Hampshire primary election, cast ballots for Patrick Buchanan, or the 4% of the Democratic voters who wrote in the name of Mario Cuomo in that election. See N.Y. Times, Feb. 20, 1992, at A21. When these citizens voted the way they did, it is reasonable to assume that many did not expect their candidate to prevail. Yet,

in the American political experience, such protest votes indicate in the unmistakable, durable and irreplaceable manner afforded by voting, various values, commitments and political judgments the voters hold dear; they affect future decisions by candidates and potential candidates; they shape party platforms; they inspire voters in other states and other elections. They are meant, to the extent possible, both to communicate the voters' feelings and to influence the future course of political events in a myriad of ways besides and beyond the direct choice of a winning candidate in the election before them. See N.Y. Times, Feb. 19, 1992, at A1 ("Mr. Buchanan's support . . . amounted to a roar of anger from those who voted in the Republican primary, and it showed the power of a 'send a message' campaign . . .").

No interviews on television, or letters to the editor, or public opinion polls could take the place of what these voters actually did in the privacy of the voting booth, with the solemnity and sacrifice of their "portion of . . . sovereign power." *Luther v. Borden*, 48 U.S. (7 How.) 1, 30 (1849)(statement of counsel, Daniel Webster). This is what makes voting a complex and immensely valuable act of "expression, commitment and choice." (Pet. Br. at 11). Respondents ignore the rich complexity of the franchise by reducing it to its most narrow instrumental function.⁴

The observations of the Fourth Circuit in *Dixon v. Maryland State Board*, 878 F.2d 776, 782 (4th Cir. 1989), aptly describe the voting interests of citizens -- like those

⁴ Even under respondents' narrow conception of voting -- a conception that looks to whether the vote can "effect a legal transfer of power" in the immediate election -- Hawaii's total ban on write-in voting raises serious constitutional concerns. There are examples where write-in voters have caused the "legal transfer of power" by electing an individual not listed on the ballot. See *Amicus Curiae* Brief of the Socialist Workers Party at 8. In such circumstances, a total prohibition against write-in voting would have defeated the will of the majority.

who voted for Buchanan or Cuomo in New Hampshire -- who use the vote to convey powerful political messages:

Such dissident voters are no doubt aware that, as efforts to achieve the actual election of their favorites, their votes probably will be without effect. Nonetheless, these voters cast their ballots as they do, in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence. Our system of government accords the expression of this hope the status of a protected right.

The State of Hawaii not only refuses to accord such expression "the status of a protected right," it refuses even to acknowledge that the expressive aspect of voting in this fashion is a sufficiently weighty constitutional interest to require that Hawaii demonstrate that its absolute prohibition against write-in voting is "necessary" to the advancement of any substantial state interests.

In advancing this position, respondents further ignore the language and logic of this Court's opinions recognizing the important expressive component to electoral participation. In *Illinois Election Board v. Socialist Workers Party*, 440 U.S. 173, 186 (1979), this Court observed that, "an election campaign is a means of disseminating ideas as well as attaining political office." And in *Eu*, 489 U.S. at 223, the Court further announced that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." See also *Anderson*, 460 U.S. at 788.

If political speech during the campaign -- even on behalf of a candidate that is not likely to prevail -- receives the highest constitutional protection, it cannot follow that such expression is completely undeserving of any constitutional recognition when it takes place in the voting booth. Political expression and ideological debate

do not end with the campaign. The expressive aspects of the electoral process surely extend into the voting booth when the citizen expresses what he or she has come to believe in the course of the campaign. That expression may take the form of support for one of the candidates listed on the ballot or it may take the form of a protest or dissent from all of the listed candidates. In either event, voting must surely involve an expressive act that enjoys sufficient constitutional recognition to require that Hawaii explain why it is "necessary" to curtail this expressive aspect of electoral participation in the way that it does.

Although respondents fashion a definition of voting that largely ignores the expressive nature of the franchise, the state does address petitioner's First Amendment arguments, in passing. Regarding the claim that Hawaii's policy conditions electoral participation upon the waiver of a citizen's right to be free from being compelled to support candidates or ideologies with which one disagrees, respondents insist that no coercive conditions are imposed here. (Resp.Br. at 40). Respondents assert that if petitioner chooses to abstain from voting for a particular candidate his vote will be recorded as a "blank vote" which will "send[] a message about the strength of a winning candidate's mandate." This message, respondents imply, will satisfy the voter's participatory and expressive interests. (Resp.Br. at 40).

Respondents make no claim, however, that a "blank vote" is the equivalent of a dissenting vote. Nor could they. For there is no reason to believe that the "blank vote" represents a conscious act of protest any more than it might signify an inadvertent error of omission; or a manifestation of voter indecisiveness; or a lack of familiarity by the voter with the candidate or candidates running for office. In short, the "blank vote" conveys no real message of dissent at all. It provides no adequate answer to the claim that Hawaii's policy requires that, in

some number of circumstances, petitioner must express support for a candidate whose views he finds distasteful or suffer the penalty of not participating in the election at all.⁵

Respondents similarly provide no adequate answer to petitioner's claim that Hawaii's policy restricts the medium of the ballot on the basis of the content of the message conveyed by the voter. In this regard, the state insists that, under *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985), it can set the "agenda" for whatever speech takes place in the voting booth and that the State of Hawaii chooses to limit the "agenda" to the candidates listed on the ballot. (Resp. Br. at 49). Respondents' reliance on *Cornelius* is misplaced for the simple reason that petitioner is prepared to respect the electoral "agenda" set by the state. Specifically, he is prepared to speak about the candidates listed on the ballot. However, instead of expressing support for at least one of the candidates on the ballot, Burdick seeks to criticize them all.

Finally, respondents' reliance upon *Rust v. Sullivan*, ___ U.S. ___, 111 S.Ct. 1759 (1991), is equally unpersuasive. By invoking *Rust*, respondents suggest that petitioner seeks to compel the government not merely to tolerate his protest vote but to subsidize it. (Resp.Br. at 48). Once again, however, respondents misconceive the nature of petitioner's claim. Petitioner seeks no special subsidy for his message. He asks only that his rights of

⁵ Respondents' suggestion that petitioner has a third option is unrealistic and unpersuasive. Respondents assert that petitioner could always spend a "Saturday afternoon" gathering "petition signatures" in support of his preferred candidate. (Resp.Br. at 40). But this suggestion conditions the right to vote on one's ability and capacity to become a political organizer sufficiently knowledgeable in the state's election law to satisfy all of the state's requirements regarding the filing of nominating petitions. This cannot be the price one must pay in order to express a protest vote.

electoral expression be treated equally with the electoral expression of all other voters. To the degree that the state counts and publicizes all votes expressing support for one of the candidates listed on the ballot, petitioner asks only that his vote -- expressing dissatisfaction with all the listed candidates and proposing an alternative choice -- be treated no differently. Petitioner seeks merely the equal right "to express his own individual will in his own way." *Oughton v. Black*, 61 A. 346, 348 (Pa. 1905).

II. HAWAII'S TOTAL BAN AGAINST WRITE-IN VOTING IS NOT "NECESSARY" TO THE ADVANCEMENT OF ANY INTERESTS PROFFERED BY THE STATE IN SUPPORT OF ITS POLICY

In defense of its policy Hawaii identifies five interests that are served by its total prohibition against write-in voting. Hawaii's policy is neither "necessary" nor "narrowly tailored" in the pursuit of any of these interests.

A. The Interest In Protecting Against Unrestrained Factionalism

Hawaii's interest in preventing "unrestrained factionalism" involves, in the first instance, a desire to prevent candidates who lose primary elections from subsequently running in the general election. (Resp.Br. at 41). In response, petitioner previously suggested that this interest could be "achieved with more 'narrowly tailored' legislation"⁶ and that "Hawaii's attempt to reach 'sore losers'

⁶ For example, Hawaii might enact an officeholder disqualification statute that would bar an individual from holding office if he or she ran unsuccessfully for that office in a primary election. Hawaii has not chosen to enact such a statute, and no such statute is now before the Court. *Compare Storer v. Brown*, 415 U.S. 724 (1974)(commenting (continued...)

by barring all write-in voting even in elections that do not involve 'sore losers' is simply too unfocused." (Pet. Br. at 38).⁷

The state responds by arguing that it is not simply concerned about candidates who lose in the primary election running a write-in campaign in the general election. Hawaii now professes to be concerned also about "[d]isappointed staff, friends, supporters and others" mounting a general election write-in campaign. (Resp.Br. at 42).

In this respect, however, the state carries its interest in avoiding factionalism to an absurd degree. The desire to promote consensus within the political system and, therefore, to avoid factionalism may well be a worthwhile goal. But consensus depends upon consent. And Hawaii carries its interest in avoiding factionalism too far when it seeks to coerce consent by barring all write-in voting. The desire to prevent factionalism can no longer be viewed even as a legitimate state interest when it is extended, as respondents seek to do here, to every voter that might be disappointed by the outcome of a

⁶ (...continued)

with approval on a California law that barred losing primary candidates from running as independents in the general election). We would only note that "sore loser" statutes focus on the candidate rather than the voter and thus raise different analytic issues than the ban on write-in voting that Hawaii has imposed here. See n.9, *infra*.

⁷ Respondents suggest that petitioner has mooted this controversy by conceding that this suit does not call into question narrowly drawn officeholder qualification statutes. (Resp.Br. at 28, n.23). Respondents base this claim upon the assertion that the policy at issue here is an officeholder qualification requirement because Hawaii refuses to permit anyone to hold office who is elected by a write-in vote. If Hawaii wants to call its broad policy prohibiting all write-in voting an "officeholder qualification requirement," it is free to do so. But, then petitioner would obviously take the position that this broad officeholder qualification requirement is unconstitutional for precisely the reasons advanced here and in Petitioner's Brief.

primary election.

B. The Interest In Protecting The Integrity Of The Party's Primary Elections

In response to Hawaii's expressed concern about "inter-party raiding," petitioner noted in his opening brief that this concern pertains only to primary elections and cannot justify a ban against write-in ballots in general elections. (Pet.Br. at 37). In addition, petitioner noted that Hawaii's alleged concern with "raiding" is undermined by its decision to permit "open" primaries. *Id.*

Hawaii now suggests that write-in voting is also necessary to prevent a person who is not a member of the party from emerging as a victor in that party's primary. (Resp.Br. at 43). However, this concern can be addressed with narrowly focused legislation imposing an affiliation requirement upon all those who would carry a party's standard into the general election. Again, the constitutionality of any such affiliation requirement is not before this Court in this case. What is before this Court is a total ban against all write-in voting, in general as well as primary elections, without any evidence that the state has attempted to pursue its legitimate interests in protecting the integrity of its political parties through narrowly tailored measures.⁸

⁸ It is petitioner's position in this case that Hawaii must permit write-in voting in primary as well as general elections. First, no political party has asserted a contrary associational claim and the Libertarian Party has expressed a clear interest in allowing write-in votes in its primary elections. See *Amicus Curiae* Brief of the Hawaii Libertarian Party at 2-3. Second, Hawaii is an overwhelmingly Democratic state and thus, as a practical matter, the results of the primary election are often dispositive. (J.A.215-84)(results of votes cast in the biennial general elections, 1976-1986). See also *Amicus Curiae* Brief of Common Cause/Hawaii at 11. Third, Hawaii law provides that the results of the primary are legally binding for all county and state legislative offices if a party's primary victor is unopposed in the general election.

(continued...)

C. The Interest In Protecting The Political Party Mandate And In Eliminating Uncontested Elections

Hawaii argues that a total prohibition against all write-in voting is necessary to protect its practice of permitting "runaway," (Resp.Br. at 12), primary winners from succeeding to office without the competition of write-in candidates. But, in those situations where Hawaii has now eliminated the general election there is no occasion to cast a write-in ballot. Thus, the total prohibition against write-in voting does not serve that interest at all. Moreover, Hawaii's statutory and constitutional provisions protecting "runaway" candidacies render it all the more important to permit citizens to cast write-in votes in these dispositive primary elections. See n.8, *supra*.

D. The Interest In Voter Education And In Protecting Against Vacancies

The state's interest in voter education was fully addressed in petitioner's opening brief (Pet.Br. at 38). No rehearsal of that argument is necessary here. The state, however, also asserts that it has an administrative interest in preventing "the occurrence of a situation where, after a candidate is elected, he [or she] is found not to possess the qualifications [for office]." (Resp.Br. at 14) (citation omitted). This concern, if legitimate, can be addressed by reasonable registration requirements for

⁸ (...continued)

See Haw. Rev. Stat. §12-41(a); Haw. Const. art. III, §4 (1991 Supp.) This confluence of factors is critical to the constitutional analysis and may not exist in many other states. As this Court observed in *Tashjian*: "The analysis of these situations derives much from the particular facts involved." 479 U.S. at 224, n.13.

write-in candidates.⁹ Such requirements permit election administrators to verify the qualifications of potential officeholders and, as petitioner has already acknowledged, present very different constitutional questions. (Pet.Br. at 31 n.22). For present purposes, however, the existence of these alternatives only underscores the unconstitutionality of the blunderbuss approach adopted by Hawaii, instead.

E. The Interest In Preventing Corruption

As a fifth interest, not relied upon by the court below, (see Cert.Pet. at 13a), the state insists that it seeks to reduce electoral corruption. It is true that in the late nineteenth century the state-prepared ballot (the Australian Ballot) was widely introduced in partial response to concerns about election fraud. But, as previously noted, most states permit some sort of write-in voting. Respondents have cited no evidence in this record that write-in voting has served as a vehicle for election fraud in the vast majority of states in which it is permitted. In the absence of any such evidence the court below -- even as it upheld Hawaii's policy -- did not even address this issue. There is no reason for this Court to give this claim any greater credence. Hawaii is free to enact if it does not already have "at its disposal a variety of criminal laws that are more than adequate to detect and de-

⁹ Petitioner does not believe that a voter should be disabled from writing in the name of an individual who has not registered as required by a candidate registration statute; nor does petitioner suggest that the write-in vote on behalf of one who has not registered should not be counted. In petitioner's view, the state's interests can be sufficiently satisfied by barring the candidate who has failed to register from holding office. The state has no real interest in also penalizing the expressive interests of the voter by refusing to permit or count a write-in vote on behalf of a candidate that failed to abide by a reasonable registration requirement. But, again this Court need not nor cannot resolve that issue in this case because Hawaii has not enacted any registration requirement, at all.

ter whatever fraud may be feared." *Dunn v. Blumstein*, 405 U.S. 330, 353 (1972).

III. THIS CASE PRESENTS AN APPROPRIATE CHALLENGE TO HAWAII'S TOTAL PROHIBITION OF WRITE-IN VOTING

Respondents assert that this suit involves a purely facial challenge where invalidation of the entire policy would be inappropriate unless there are "no set of circumstances . . . under which the [policy] would be valid." (Resp.Br. at 47)(citations omitted). Respondents further suggest that the regulation of write-in voting would be appropriate in at least some circumstances and, thus, the facial invalidation of Hawaii's policy is inappropriate here. Respondents' argument is without merit.

This case began in 1986 when petitioner was told by Hawaii election officials that the state's policy against write-in voting meant that he either had to vote for the only candidate listed on the ballot in petitioner's state legislative district or not vote at all. From the very outset, therefore, petitioner was challenging Hawaii's ban on write-in voting as applied to him in a specific election.¹⁰ At the same time, a ruling that petitioner's constitutional rights were violated in 1986 would necessarily doom Hawaii's general policy against write-in voting since the state has never pointed to any particular facts that distinguish petitioner's situation from any other. Under these circumstances, it is not at all clear that the line between "facial" and "as applied" challenges has any meaning.

¹⁰ In this respect, petitioner's "as applied" challenge is no less cognizable because he "did not identify any particular candidate for whom he wished to cast a write-in vote." (Resp.Br. at 46 n.36). It is sufficient, for Article III as well as prudential standing purposes, that petitioner sought to express his opposition to the only candidate appearing on the ballot in Burdick's state legislative district. (See Pet. Reply to Br. in Opp. at 5-7).

Even if viewed as a facial challenge, however, this case closely resembles *Board of Airport Comm. of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), where, the Court struck down a resolution that imposed a total prohibition against all "First Amendment activities" within an airport terminal.¹¹ The Los Angeles Commissioners could have promulgated more narrowly tailored regulatory measures to address the municipality's genuine concerns but opted, instead, for a total prohibition. Similarly, Hawaii could have adopted a series of narrowly drawn regulations to address its specific concerns. Having failed to do so, the state cannot ask this Court to step into the breach and perform this essentially legislative task.

As previously noted, there are a number of legislative alternatives that may be available to Hawaii in furtherance of its legitimate interests. The choices among those alternatives can and should be made in the first instance by the state's political branches. The constitutionality of such regulatory measures will have to be determined if and when they are enacted.

For similar reasons, there is no basis to respondents' claim that, "[a]ppplied generally, the [judgment below] would have nullified the laws [in] more than thirty States" (Resp.Br. at 1). The decision of the district court, if upheld, would speak only to the law in Hawaii and, perhaps, to the law in those handful of states that choose to prohibit all write-in voting in all elections and under

¹¹ *Jews for Jesus* was decided on overbreadth grounds, although the plaintiffs in that case were asserting their own constitutional rights and not, in the traditional overbreadth sense, the constitutional rights of third parties. Here too petitioner asserts his own constitutional rights.

all circumstances.¹²

In sum, the 1986 state legislative election left Burdick with two unpalatable choices: he could either vote for the sole candidate appearing on the ballot or he could choose not to vote at all. Petitioner asserts that the First and Fourteenth Amendments to the federal Constitution guarantee him another choice: the right to vote against the only candidate appearing on the ballot in Burdick's state legislative district and to vote, instead, for his preferred candidate. Hawaii's total prohibition against all write-in voting cannot constitutionally deny him that right.

¹² Even those states might be able to demonstrate a more compelling need for such a prohibition than Hawaii has demonstrated.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

Arthur N. Eisenberg
(*Counsel of Record*)
New York Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Mary Blaine Johnston
90 Central Avenue
Wailuku, Maui, Hawaii 96793
(808) 244-8750

Carl Varady
American Civil Liberties Union
of Hawaii Foundation
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813
(808) 545-1722

Paul W. Kahn
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4846

Lawrence G. Sager
Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6100

Alan B. Burdick
820 Mililani Street, Suite 702
Honolulu, Hawaii 96813
(808) 537-5300

Dated: March 13, 1992

(5)

No. 91-535

Supreme Court, U.S.

FILED

JAN 22 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ALAN B. BURDICK,

Petitioner,

- v. -

MORRIS TAKUSHI, Director of Elections,
State of Hawaii; JOHN WAIHEE, Lieutenant
Governor of Hawaii, BENJAMIN CAYETANO,
in his capacity as Lieutenant Governor
of the State of Hawaii,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE FOR THE
HAWAII LIBERTARIAN PARTY AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

ARLO HALE SMITH
66 San Fernando Way
San Francisco, CA 94127
(415) 564-6091

*Attorney for Amicus Curiae
Hawaii Libertarian Party*

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
Summary of Argument	1
Argument	1

TABLE OF AUTHORITIES

Page

CASES:

Eu v San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 3

Tashjian v Republican Party of Connecticut, 479 U.S. 208 (1986) 3

STATUTES:

Ariz. Rev. Stat. § 16-312 (1984 & Supp. 1991) 3

Ark. Stat. Ann. § 7-5-205 (1991) 3

Cal. Elec. Code § 7300ff (West 1977 & Supp 1991) 3

Colo. Rev. Stat. § 1-4-1001 (Supp. 1991) 3

Ct. Gen. Stat. Ann. § 9-175 (West 1989) 3

Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991) 3

Ga. Code Ann. § 21-2-133 (1987 & Supp. 1990) 3

Idaho Code § 34-702A (Supp. 1991) 3

Ill. Ann. Stat. Ch. 46, para. 17-16.1 (1989 & Supp. 1991) 3

Ind. Code Ann. § 3-8-2-2.5 (Burns 1988 & Supp. 1991) 3

Kan. Stat. Ann. § 25-305(c) (1986 & Supp. 1991) 3

Md. Elec. Code Ann. art. 33 § 17-5(b) (1989) 3

Mass. Gen. Laws Ann. ch. 54, § 78A (1990) 3

Mo. Ann. Stat. § 115.453(4) (Vernon Supp. 1991) 3

TABLE OF AUTHORITIES – Continued

Page

Mont. Code Ann. § 13-10-211 (1989 & Supp 1991) 3

Nebr. Rev. Stat. § 32-428.10(2) (1989) 3

N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991) 3

N.Y. Elec. Laws § 6-153 (McKinney 1978 & Supp. 1991) 3

N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991) 3

N.D. Century Code § 16.1-12-02.2 (Supp. 1991) 3

Ohio Rev. Code § 3513.041 (Anderson 1988 & Supp. 1991) 3

Ore. Rev. Stat. § 249.007 (Supp. 1991) 3

Tex. Elec. Code Ann. § 192.036 (Vernon 1986 & Supp. 1991) 3

Utah Code Ann. § 20-7-20, 2nd par. (Supp. 1991) 3

Wash. Rev. Code § 29.04.180 (1965 & Supp. 1991) 3

Wis. Stat. Ann. § 8.185(1) (1986 & Supp. 1991) 3

INTEREST OF THE AMICUS

The Hawaii Libertarian Party is a qualified political party in Hawaii, and under the laws of the state, must nominate all its candidates (other than for presidential elector) by primary. the Hawaii Libertarian Party is injured by the fact that write-in votes are not allowed in its primary election. The Hawaii ban on write-ins in primary elections prevents the party from running as many candidates as it would like to run.

I. SUMMARY OF ARGUMENT

The U.S. Constitution, First and Fourteenth Amendments, protects the right of political parties to decide for themselves how to define their membership and how to nominate their candidates. The ban on write-in voting in Hawaii, which includes a ban on write-ins in the primary held for the Libertarian Party, interferes with the party's own wishes as to how best to nominate candidates.

II. ARGUMENT

The Hawaii Libertarian Party has been entitled to nominate its candidates for public office by primary (for all offices other than presidential elector) in the elections of 1976 through 1984, and 1988 through the present time. The party is qualified to participate in the 1992 primary. Hawaii election laws do not permit the party to nominate candidates other than by primary.

No other political party in Hawaii has nominated candidates by primary, other than the Democratic and Republican Parties, since 1982.

The Hawaii Libertarian Party desires that voters who vote in its primary be permitted to cast write-in votes in the party's primary. However, the party desires that write-in votes cast in its primary not to be counted unless the person who receives write-in votes has filed a declaration of write-in candidacy no later than a week before the primary. The party desires that no one would be eligible to file as a declared write-in candidate, in the party's primary, who would not have been eligible to file to appear on the Libertarian primary ballot.

The party desires to let voters nominate write-in candidates at its primary because the party believes that more candidates could be recruited to run, if write-in nominations were possible. The party suffers from a dearth of candidates, especially for the legislature (for example, in 1990, there was only one Libertarian candidate for the state legislature, out of a total of nine Hawaii Libertarians running for public office that year).

The party believes that potential candidates might be persuaded to run in September of an election year, whereas such individuals often are not interested in running in July (the Hawaii primary is held in mid-September; the filing deadline to get on the ballot is always in July). This is because interest in electoral politics in Hawaii is still low during July, whereas it increases greatly by September.

The party does desire to protect itself from having non-Libertarians run in the Libertarian primary. Therefore, the party wants the restrictions in place which are described above, on who can run as a write-in candidate in the party primary. Twenty-six other states provide that

write-in votes will not be counted, except for write-in candidates who file a declaration of candidacy shortly before the primary or the election, at least for certain office.¹

In *Tashjian v Republican Party of Connecticut*, 479 U.S. 208 (1986) and in *Eu v San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), this Court held that a state political party has a constitutional right to decide for itself, how it conducts its internal nominating affairs. Therefore, the ban on write-in voting in primaries, in the case of the Hawaii Libertarian Party, is not only an infringement on the rights of voters; it is also infringement on the rights of the party. Amicus curiae asks this Court to reverse the decision of the 9th circuit, so that the

¹ See Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1991), Ark. Stat. Ann. § 7-5-205 (1991), Cal. Elec. Code § 7300ff (West 1977), Colo. Rev. Stat. § 1-4-1001 (Supp. 1991), Conn. Gen. Stat. Ann. § 9-175 (West 1989), Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991), Ga. Code Ann. § 21-2-133 (1987 & Supp. 1990), Idaho Code § 34-702A (Supp. 1991), Ill. Rev. Stat. ch. 46, para. 17-16.1 (1989), Ind. Code Ann. § 3-8-2-2.5 (Burns 1988 & Supp. 1991), Kan. Stat. Ann. § 25-305(c) (1986 & Supp. 1991), Md. Elec. Code Ann. art. 33 § 17-5(b) (1989), Mass. Gen. Laws Ann. ch. 54 § 78A (1990), Mo. Ann. Stat. § 115.453(4) (Vernon Supp. 1991), Mont. Code Ann. § 13-10-211 (1989 & Supp. 1991), Neb. Rev. Stat. § 32-428.10(2) (1989), N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991), N.Y. Elec. Laws § 6-153 (McKinney 1978 & Supp. 1991), N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991), N.D. Cent. Code § 16.1-12-01.1 (Supp. 1991), Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991), Or. Rev. Stat. § 249.007 (Supp. 1991), Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991), Utah Code Ann. § 20-7-20, 2nd para. (Supp. 1991), Wash. Rev. Code § 29.04.180 (1965 & Supp. 1991), Wis. Stat. § 8.185(1) (1986 & Supp. 1991).

primary election ballots of the Hawaii Libertarian Party
may include write-in spaces.

Respectfully submitted,

ARLO HALE SMITH

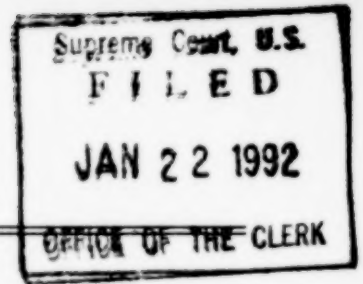
66 San Fernando

San Francisco, CA 94127

(415) 564-6091

Counsel for Amicus Curiae

(6)
No. 91-535



In The
Supreme Court of the United States
October Term, 1991

— ♦ —
ALAN B. BURDICK,

Petitioner,

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii;
JOHN WAIHEE, Lieutenant Governor of Hawaii,
BENJAMIN CAYETANO, in his capacity as Lieutenant
Governor of the State of Hawaii,

Respondents.

— ♦ —
On Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

— ♦ —
BRIEF FOR ANDRE MARROU, LENORA B. FULANI,
AND THE COALITION FOR FREE & OPEN
ELECTIONS AS AMICUS CURIAE IN
SUPPORT OF PETITIONERS

— ♦ —
JAMES C. LINGER
1710 S. Boston Ave.
Tulsa, OK 74119
(918) 585-2797
Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
CONSENT TO FILING BRIEF AMICUS CURIAE ...	1
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	2

TABLE OF AUTHORITIES

Page

CASES:

<i>Anderson v Celebrezze</i> , 460 U.S. 780 (1983)	2
<i>Kamins v Board of Elections of the District of Columbia</i> , 324 A 2d 187 (D.C., 1974)	5
<i>Munn v Secretary of State</i> , unreported, no. 51041 (Mich. Supreme Court, 1964).....	5
<i>Paul v State of Indiana Election Board</i> , 743 F Supp 616 (S.D. Ind., 1990).....	5
<i>Socialist Labor Party v Rhodes</i> , 290 F Supp 983 (S.D. Ohio, 1968).....	5

OTHER:

<i>Statistics of the Presidential & Congressional Election</i> , various editions, Clerk of the U.S. House of Representatives.....	2, 3
<i>America at the Polls</i> , by Richard M. Scammon (1965: Univ. of Pittsburgh Press).....	3

CONSENT TO FILING BRIEF AMICUS CURIAE

All parties to the instant cause have consented to the filing of this brief of the Amicus Curiae as evidenced by the filing of the Consent to Filing of Brief Amicus Curiae herein.

INTEREST OF THE AMICI

Amici Andre Marrou and Lenora B. Fulani are candidates for president in the election of November, 1992, and both candidates have some supporters in every state in the nation. Marrou is the presidential candidate of the Libertarian Party. Fulani expects to receive the presidential nomination of the New Alliance Party and several other parties. Both Marrou and Fulani will strive to qualify for the ballot of all states, but chances are that one or both of them will fail to qualify in at least a few states. In such states, both candidates have an interest in at least receiving write-in votes from supporters.

Amicus Coalition for Free & Open Elections (COFOE) is an unincorporated association of organizations and individuals, formed in 1985, to work for full and fair access to the electoral process. The Coalition includes political parties which run candidates for all levels of public office.

I. SUMMARY OF ARGUMENT

Even if Hawaii has a valid interest in prohibiting all write-in votes for office other than president, Hawaii has no valid interest in prohibiting write-in votes for presidential candidates in general elections. A ban on write-in

votes for president in Hawaii, and other states, is particularly harmful to the voting process. Third party and independent candidates almost invariably are on the ballot in some states, but not other states; and a write-in ban for president prevents such national candidates from receiving votes from *some* of the voters who wish to vote for them.

II. ARGUMENT

In *Anderson v Celebrezze*, 460 U.S. 780, this Court held that "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson*, at p. 795.

Hawaii has offered no state interest whatsoever in prohibiting write-in votes for president at general elections. The Ninth Circuit did not mention the issue of write-in votes for presidential candidates, yet its endorsement of the Hawaii ban on write-in votes is so sweeping, there is little doubt that the ban on presidential write-ins will stand, unless this Court reverses it.

Third party and independent presidential candidates almost invariably get on the ballot in some states, but not all states. According to *Statistics of the Presidential & Congressional Election of (Year)*, a booklet published by the Clerk of the U.S. House of Representatives following each presidential election, the only third party or independent presidential candidates who have appeared on the ballot in all jurisdictions which elect presidential electors, since

1916, have been Ed Clark (Libertarian presidential candidate in 1980), John B. Anderson (Independent presidential candidate in 1980), and Lenora B. Fulani (New Alliance presidential candidate in 1988)

Even major party presidential candidates sometimes fail to get on the general election ballot of certain states. In 1912, Republican nominee (and the incumbent president) William Howard Taft was not on the November ballot in California or South Dakota. In 1948, Harry Truman, Democratic nominee and the incumbent president, was not on the November ballot in Alabama. In 1964, Lyndon B. Johnson, Democratic nominee and the incumbent president, was not on the November ballot in Alabama. See *Statistics of the Presidential & Congressional Election for 1912, 1948, and America at the Polls 1920-1964*, by Richard M. Scammon.

When a presidential candidate in the general election is not on the ballot of a particular state, and that state does not even permit write-in votes, that presidential candidate cannot receive votes from some of his supporters. This not only harms the presidential candidate, and the voters who were deprived of an opportunity to vote for him; it also harms the voters who did vote for that presidential candidate in other states, since their votes are diluted.

Hawaii ballot access procedures for third party and independent presidential candidates requires a petition signed by 1% of the last vote cast in the state, now approximately 4,000 signatures. Hawaii argues that this is lenient. It may be relatively lenient, but it is sufficiently

difficult to have kept some of the third party and independent presidential candidates with relatively high support in recent elections from appearing on the Hawaii ballot. Even relatively lenient petition procedures sometimes prevent candidates from qualifying and – more importantly – totally disenfranchises their supporters from voting for them in states which ban write-in voting.

There were no government-printed ballots in state or federal elections in the U.S. until 1888. Prior to that time, voters could prepare their own ballots. The first recording of write-in votes for president, after the existence of the government-printed ballot created the possibility of such votes, was in 1912. In California, voters who wished to vote for William Howard Taft, the Republican nominee, had to write in a full slate of presidential electors pledged to Taft. Only 3,914 voters cast such a vote (approximately one-half of 1% of the number of votes cast in California for president).

To overcome the problem that voters who wished to cast a write-in vote for president were forced to the cumbersome task of writing in a full slate of presidential electors, California hit upon the idea that a write-in candidate for president should file a declaration of candidacy at least a few days in advance of the November election, with an enclosed slate of presidential elector candidates pledged to him. Then, the voter could cast a write-in vote for that presidential candidate, and such write-in votes would be deemed to be cast for the slate of electoral candidates on file pledged to that candidate (by analogy, all states now provide that votes cast for presidential candidates listed on the ballot are really deemed

to be votes for a slate of electors pledged to that presidential candidate; no state any longer provides that voters vote directly for individual elector candidates).

Since then, other states have adopted the idea. When courts have ruled that states must provide a chance for voters to cast write-in votes for president, they have always included the idea in the relief. See *Socialist Labor Party v Rhodes*, 290 F.Supp 983 (S.D. Ohio, 1968), *Kamins v Board of Elections of the District of Columbia*, 324 A 2d 187 (D.C., 1974), *Munn v Michigan Secretary of State*, unreported, no.51041 (Mich. Supreme Court, 1964) and *Paul v State of Indiana Election Board*, 743 F.Supp 616 (S.D. Ind., 1990).

Respondents have never even discussed the issue of write-ins for president in general elections. In the apparent absence of any state interest in a ban on write-in votes for president, this Court should reverse the Ninth Circuit and rule that the First and Fourteenth Amendments to the U.S. Constitution protect a voter's right to vote for the candidate of his or her choice, for president, whether that candidate has gained a place on the ballot or not.

Respectfully submitted,

JAMES C. LINGER
1710 S. Boston Ave.
Tulsa, OK 74119
(918) 585-2797
Counsel for Amici Curiae

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii;
BENJAMIN CAYETANO, in his capacity as Lieutenant
Governor of the State of Hawaii,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR AMICUS CURIAE
SOCIALIST WORKERS PARTY
IN SUPPORT OF PETITIONER**

Edward Copeland
(Counsel of Record)
Eric M. Lieberman
RABINOWITZ, BOUDIN, STANDARD
KRINSKY & LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003
(212) 254-1111

Counsel for Amicus Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. HAWAII'S BLANKET PROHIBITION AGAINST WRITE-IN VOTING IN ALL GENERAL AND PRIMARY ELECTIONS SUBSTANTIALLY AND UNJUSTIFIABLY INTERFERES WITH THE RIGHTS OF VOTERS TO EXPRESS THEIR SUPPORT FOR CANDIDATES OF THEIR OWN CHOOSING AND TO PARTICIPATE FULLY AND FREELY IN THE ELECTORAL PROCESS	4
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Celebrezze, 460 U.S. 780 (1983)	4-5, 6, 7, 11, 12
Board of Estimate v. Morris, 489 U.S. 688 (1989)	4
Brown v. Socialist Workers ' 74 Campaign Committee (Ohio), 459 U.S. 87 (1982)	1, 9
Bullock v. Carter, 405 U.S. 134 (1972)	11
Canaan v. Abdelnour, 40 Cal. 3d 719, 221 Cal. Rptr. 468 (1985)	7
Dixon v. Maryland State Administrative Board of Election Laws, 878 F.2d 776 (4th Cir. 1989)	2, 7, 8
Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1986)	6, 12
Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	2, 5
Jenness v. Fortson, 403 U.S. 431 (1971)	7
Kusper v. Pontikes, 414 U.S. 51 (1973)	5
Lubin v. Panish, 415 U.S. 709 (1974)	7

Munro v. Socialist Workers Party, 479 U.S. 189 (1986)	11
Norman v. Reed, <u>U.S.</u> , 60 U.S.L.W. 4075 (Jan. 14, 1992)	6
Reynolds v. Sims, 377 U.S. 533 (1964)	4
Socialist Labor Party v. Rhodes, 290 F.Supp. 983 (S.D. Ohio), aff'd in part, mod. in part sub nom. Williams v. Rhodes, 393 U.S. 23 (1968)	7
Storer v. Brown, 415 U.S. 724 (1974)	7
Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)	6, 9, 10
Wesberry v. Sanders, 376 U.S. 1 (1964)	4
Williams v. Rhodes, 393 U.S. 23 (1968)	5, 7
Statutes	
Haw. Rev. Stat § 11-62	11
Haw. Rev. Stat § 12-41(b)	11
Other Authorities	
38 Cong. Q. Weekly Report 3319 (Nov. 8, 1980)	8
12 Election Administration Reports, Nov. 22, 1982	8

21 Election Administration Reports, Jan. 21, 1991	8
Developments In the Law-Elections, 88 Harv. L. Rev. 111 (1975)	11
2 W. Manchester, The Glory And The Dream, A Narrative History of America 1932-1972 (1973)	8
The Militant, Oct. 26, 1964	9
The Militant, Oct. 29, 1976	9
The Militant, Oct. 31, 1980	9
The Militant, Nov. 16, 1984	9
The Militant, Nov. 4, 1988	9
The Militant, Nov. 10, 1989	9
The Militant, Nov. 9, 1990	9
N.Y. Times, Nov. 10, 1991	8
The Washington Post, Nov. 11, 1991	8

INTEREST OF AMICUS CURIAE

The Socialist Workers Party presents this brief as Amicus Curiae in support of Petitioner, and respectfully requests this Court to reverse the decision of the Court of Appeals for the Ninth Circuit. That court held constitutional Hawaii's blanket prohibition on write-in voting in all general and primary elections finding that the ban did not constitute a substantial burden on petitioner Alan B. Burdick's right to vote or his right of political expression.

Amicus Socialist Workers Party is an unincorporated association with headquarters in New York City and branches in cities throughout the country. The Socialist Workers Party seeks "to achieve social change through the political process, and its members regularly run for public office." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 88 (1982). The Socialist Workers Party (SWP) has consistently supported and run candidates for elective office throughout the country for municipal, county, state and federal offices since 1938 and has participated in every presidential election since 1948. Although the Socialist Workers Party has consistently fielded candidates for office, no Socialist Worker Party candidate has been elected in a partisan election and the votes recorded for such candidates remain small.

The vast majority of individuals supported by the Socialist Workers Party and its members have run as write-in candidates. For example, between 1988 and 1990 alone, approximately 210 individuals supported by the Socialist Workers Party ran for office as write-in candidates. One of the principal activities of the members and supporters of the Socialist Workers Party is comprised of participation in such campaigns. The campaigns take the form of distribution of literature, speaking tours for candidates, media interviews, extending solidarity to others fighting social and economic

injustices, and other election activity. The campaigns are a major opportunity for those who support the platforms and goals of the Socialist Workers Party to discuss and participate in the political process. Candidates and their supporters present basic socialist ideas and engage in discussion with thousands of workers and youth, focusing on a working-class alternative to the foreign and domestic policies of the predominant parties in the country. The opportunity for voters to express support for the Socialist Workers Party candidates by write-in voting, and to thereby participate fully in the electoral process, is of the utmost importance both to the supporters of the candidates and to those who participate in electoral activity. It is a means of associating together in a public, yet anonymous way, and "a means of disseminating ideas as well as attaining political office." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979).

The Socialist Workers Party has from its inception been opposed to restrictions on the franchise. It has both engaged in litigation and broader political action along with others to expand voting rights of all individuals in our society and to make meaningful the right to vote. Such freedoms are essential for all to be able to present their views and have those views heard and felt by the public at large. Candidates affiliated with the Socialist Workers Party were plaintiffs in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989). That ruling held unconstitutional a Maryland requirement that imposed a \$150 filing fee upon candidates wishing to have ballots in their favor tallied and reported. The court below acknowledged that its decision was inconsistent with the Fourth Circuit decision in *Dixon*. (Pet. App. 14a.)^{1/}

^{1/} Citations preceded by Pet. App. refer to the petition for certiorari.

The Socialist Workers Party therefore has a strong interest in assuring that unconstitutional prohibitions on write-in voting do not smother the rights of individuals to vote and to thus participate fully in the electoral process. Prohibiting the casting of write-in ballots stifles a mode of associating with other like-minded individuals in support of a candidate or the ideas he or she presents.

SUMMARY OF ARGUMENT

The broad prohibition against write-in voting in general and primary elections in Hawaii directly and substantially restricts the rights of voters to participate fully in the electoral process. The prohibition bars the voter from expressing his or her support for a candidate and for the goals of a candidate if the candidate is not listed on the preprinted ballot. It restricts the voter from expressing his or her rejection of the candidates listed, and restricts the voter from associating with other like-minded individuals in a uniquely public, yet anonymous, manner. The franchise is undermined without the right to cast a ballot for the candidate of choice, whether or not the candidate's name appears on the ballot.

These rights of political participation are fundamental and have repeatedly been recognized as protected by the First and Fourteenth Amendments. In the context of write-in voting, these rights are particularly important to those of minority and dissenting views, for whom elections are not only the means of electing those who govern, but are also a means of associating together in the electoral arena and to show support for dissenting ideas and programs.

The broad and unyielding prohibition is not justified by the various interests asserted by the State of Hawaii. None of these justifications, even if legitimate, show that the complete ban is necessary to fulfill a compelling state interest. Nor is the broad prohibition somehow ameliorated by the lower

court's view that parties and candidate have easy access to the Hawaii ballot. Even if it were true, that focus ignores the independent and fundamental rights of voters which lie at the heart of this case.

ARGUMENT

I

HAWAII'S BLANKET PROHIBITION AGAINST WRITE-IN VOTING IN ALL GENERAL AND PRIMARY ELECTIONS SUBSTANTIALLY AND UNJUSTIFIABLY INTERFERES WITH THE RIGHT OF VOTERS TO EXPRESS THEIR SUPPORT FOR CANDIDATES OF THEIR OWN CHOOSING AND TO PARTICIPATE FULLY AND FREELY IN THE ELECTORAL PROCESS

This Court has long recognized the fundamental interests at stake when a state regulates voting, for "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). See also *Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989); *Reynolds v. Sims*, 377 U.S. 533, 554-555, 565 (1964).

Elections, and the critical act of voting, serve a number of interrelated functions. Participation in elections and the act of voting are not only the means by which voters express their preferences for individuals to fill an office, but are also a means by which voters freely associate "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like minded citizens." *Anderson v. Celebrezze*, 460

U.S. 780, 788 (1983) (footnote omitted). As has been oft recognized "an election campaign is a means of disseminating ideas as well as attaining political office", *Illinois Election Board v. Socialist Workers Party*, 440 U.S. 173, 186 (1979), and through participation in the electoral process, voters associate with other voters, candidates and parties "for the common advancement of political beliefs and ideas. . . ." *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973).

As a manner of expressing opinion, and of associating together to advance particular political beliefs, voting is a means of expressing political opinions within the protection of the First and Fourteenth Amendments. See *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). Thus, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court focused upon the impact of candidate eligibility requirements on the rights of voters not only to choose the candidate to fill an office, but also "to associate in the electoral arena to enhance their political effectiveness as a group", *Anderson v. Celebrezze*, 460 U.S. at 794. Such association thereby promotes "diversity and competition in the marketplace of ideas", and introduces new ideas and programs into the political life of our nation. *Id.* See also *Illinois Election Board v. Socialist Workers Party*, 440 U.S. at 185-186.

As the courts below recognized, the framework set forth in *Anderson v. Celebrezze*, 460 U.S. at 789, provides the appropriate means for the Court to analyze restrictions on participation in elections:

It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those

interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

See also *Norman v. Reed*, ___ U.S. ___, 60 U.S.L.W. 4075, 4077 (Jan. 14, 1992). *Norman* reaffirms that within the *Anderson* analysis "any severe restriction" must be "narrowly drawn to advance a state interest of compelling importance." ___ U.S. at ___, 60 U.S.L.W. at 4077. See also, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1986) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

The Hawaii statutory scheme directly restricts the rights of the voters by flatly prohibiting a voter from casting a write-in vote in all circumstances. Under the Hawaii scheme, whenever a voter decides that the choice of candidates on the pre-printed ballot does not present an individual or platform that he or she can or desires to support, that voter must either choose one of the candidates on the pre-printed ballot or accept denial of the right to vote. Whether the voter's reason is based upon a late-developing issue, new information concerning an issue or candidate, disgruntlement with the choices offered on the pre-printed ballot or any other concern that affects how an individual votes, under Hawaii's restrictions a vote cannot be cast for anyone other than the candidates listed by the state on the pre-printed ballot.

The prohibition on write-in voting in all circumstances imposes a direct restriction on the right of voters not only to vote for the candidate of their choice when that candidate is not one of the listed candidates, but also on the voter's right to associate with other like-minded individuals and to express support for a candidate and for the goals that the candidate represents. Indeed, the prohibition forces a voter who desires

to cast a vote, to vote for a candidate listed or to forego voting: a voter who seeks to vote as a means of expressing rejection of the candidates on the ballot is prohibited from doing so.

It is because the fundamental right to vote is restricted, and the right of voters to engage in political expression and association is restricted, that a number of courts have found the injury to these rights protected by the First and Fourteenth Amendments to be "substantial", *Canaan v. Abdelnour*, 40 Cal.3d 703, 221 Cal.Rptr. 468, 477 (1985) and "of great magnitude", *Dixon, supra*, 478 F.2d at 782.

Write-in voting may well be a less likely route to achieve election for a candidate than listing on the pre-printed ballot. The practical difficulties associated with write-in voting turn upon a recognition that "realities of the electoral process" require that a write-in voter not only remember the name of the candidate but also require him or her to "take the affirmative step of writing it on the ballot." *Anderson v. Celebrezze*, 460 U.S. at 799 n. 26, quoting *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974). See also *Williams v. Rhodes*, 393 U.S. at 37 (Douglas, J. concurring) ("[E]ven where operative, the write-ins are no substitute for a place on the ballot."). Nonetheless the option of the write-in ballot has been recognized by this Court. *Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974) (In holding constitutional a requirement that an independent candidate had not been affiliated with a political party for one year before primary, noting that the write-in alternative remained open.); *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

But the opportunity to cast a write-in vote is not of diminished importance to the voter's ability to participate in the electoral process because a candidate receiving such votes may not have a great likelihood of success. As the district court observed in *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983, 987 (S.D. Ohio), *aff'd in part, mod. in part sub nom., Williams v. Rhodes*, 393 U.S. 23 (1968) "[a] write-in ballot

permits a voter to effectively exercise his individual constitutionally protected franchise. The use of write-in ballots does not and should not be dependent on the candidate's chance of success." See also *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d at 781. Indeed, when understood to require an affirmative act and commitment, casting a write-in vote reflects an element of political participation, and an expression of political message, that sometimes exceeds the simple act of voting.

Nor is that right to participate in the electoral process by write-in voting a right of limited practical importance. First, as a general matter, while write-in voting may infrequently result in the actual election of such a candidate, individuals are elected as write-in candidates. For example, in November 1991 an individual was elected to the Albany County Legislature in New York, *N.Y. Times*, Nov. 10, 1991, § 1 at 42, col. 1, in 1990 an individual was elected to the Prince Georges County Council in Maryland, *The Washington Post*, Nov. 11, 1990, at C1, and according to one report, 40 write-in candidates were elected in Indiana in 1990. 21 Election Ad. Rep. Jan. 21, 1991, No. 2, at 3. Similarly, four write-in candidates have been elected to Congress in the last 40 years; Strom Thurmond to the Senate in 1954, Dale Alford to the House of Representatives in 1958, Joe Skeen to the House of Representatives in 1980 and Ron Packard to the House of Representatives in 1982. 12 Election Ad. Rep., Nov. 22, 1982, No. 22, at 1-2; 38 Cong. Q. Weekly Report 3319 (Nov. 8, 1980). Indeed, in 1964, the Republican primary in New Hampshire "was won with write-in votes by a man who hadn't announced [his candidacy] at all, Henry Cabot Lodge." 2 W. Manchester, *The Glory And The Dream, A Narrative History of America 1932-1972*, 1256 (1973).

Second, supporters of write-in candidates, including those supported by the SWP, utilize the write-in mechanism with some frequency not only as the means of voting for the can-

didate of their choice but as a means of associating together in a publicly expressive fashion.^{2/} For example, the Presidential candidate supported by the Socialist Workers Party in 1988 appeared on the ballot in 16 states; in the remaining states write-in voting, where available, was the only means of voting for the candidate.^{3/} In the same year, the Socialist Workers Party supported 43 other candidates in 24 states and the District of Columbia of whom only 11 were listed on the ballot. In 1989, the Socialist Workers Party supported 18 candidates for local election in 9 states and the District of Columbia of whom 8 were listed on the ballot. In 1990 the Socialist Workers Party supported 175 candidates in 23 states including the District of Columbia of whom 11 were listed on the ballot in 9 states. Of the remainder, 17 attained "official" write-in status under the applicable statutes. See *The Militant*, Nov. 4, 1988, at 3; *id.*, Nov. 10, 1989 at 14; *id.*, Nov. 9, 1990, at 13.

The frequency of use of the write-in candidacy, along with the occasional actual electoral success of such candidates, illuminates the importance of the write-in for electoral par-

^{2/} The anonymity of the ballot as a means of expressing support for particular groups and ideas make the opportunity to cast a write-in vote particularly meaningful for supporters of groups that historically have suffered harassment because of their association with particular political viewpoints. See *Tashjian v. Republican Party of Connecticut*, 479 U.S. at 215 n.5. See also, *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).

^{3/} The Socialist Workers Party has supported Presidential candidates in every Presidential election since 1948. The SWP's Presidential ticket was on the ballot in 9 states in 1964; 19 states in 1972; 28 states in 1976; 27 states in 1980; and 24 states in 1984. See, *The Militant*, Oct. 26, 1964, at 4; *id.*, Oct. 29, 1976, at 6; *id.*, Oct. 31, 1980, at 12; *id.*, Nov. 16, 1984, at 3. Write-in voting, where available, was the only means of voting for these candidates in the remaining states.

ticipation. The ability to cast a write-in vote is of essential importance to those of dissenting and minority views, and those who choose to reject the candidates on a particular ballot and the positions represented by them. The Hawaii ban frustrates the ability of these voters who would otherwise cast a write-in vote to participate in the electoral process.

That the Hawaii scheme does so in a manner which is both absolute and unyielding is obvious from the complete prohibition of Hawaii law. That it does so without any sufficient justification is apparent if only because the broad prohibition on write-in voting imposes far too wide a restriction than is justified by the various interests and is not narrowly drawn to advance a state interest of compelling importance. For example, the asserted interest in protecting against so called "sore loser" candidacies could be served by a narrower and more focused regulation. The interest in preventing party raiding is not a concern in a general election and is not a serious concern in an open primary such as Hawaii's. It therefore is insufficient to justify the broad prohibition. See *Tashjian v. Republican Party of Connecticut*, 479 U.S. at 219 and n.9 (recognizing the "continuing difficulty of proving that raiding is possible" but expressing no opinion as to whether that difficulty "attenuates the asserted state interest in preventing the practice").

The court below was of the view that Hawaii election laws "provide candidates with considerable ease of access to the ballot" and so if Burdick desires to vote for a particular candidate, that candidate need only qualify under the Hawaii procedures. (Pet. App. 11a.) Ease of access to the ballot for candidates, even if true^{4/}, does not ameliorate the frustra-

^{4/} Hawaii's ballot access requirements present considerable obstacles and do not provide the ease of access to the ballot seemingly contem-
(continued...)

tion of the voter's rights involved here. While the rights of voters protected by the Constitution and the rights of candidates and political parties are intertwined in the electoral context and "do not lend themselves to neat separation", *Bullock v. Carter*, 405 U.S. 134, 143 (1972), the rights of a voter are not identical with that of a candidate or of a political party.

Moreover, whatever the ballot access requirements, whether a political party seeks to qualify its candidate for

^{4/}(...continued)

plated by the court below. For example, Hawaii's provision for new political parties requires a petition signed by 1% of the number of registered voters as of the last general election to be submitted 150 days before the primary, Haw. Rev. Stat. § 11-62. In order to utilize the new party route, an individual who might cast a write-in vote would be required to so decide long before the primary, even longer before the general election, and long before the issues in a campaign become focused by the electorate. See *Anderson v. Celebrezze*, 460 U.S. 780. Moreover, the process of forming a new party involves a formal affiliation with that party. Such affiliation requires a considerably different type of commitment than the commitment of write-in voters, and that commitment is an act of public affiliation which may not reflect the interest of a write-in voter who wishes to cast a write-in vote for only one particular office. See *Tashjian*, 479 U.S. at 215 n.5; cf. *Developments In the Law-Elections*, 88 Harv. L. Rev. 1111, 1167 n.79 (1975) (individual voter may have one party of choice on the state level and a separate national or local party of choice.) Similarly, in order to qualify for the general election ballot as an independent candidate for an office other than president, a candidate must run in the independent primary and either poll 10% of the vote or out poll the primary winner in a partisan campaign. Haw. Rev. State § 12-41(b). Compare *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding Washington requirement of 1% of vote in the primary). Indeed, in contrast to the Washington procedure in *Munro*, a voter may only vote in a particular primary in Hawaii. While perhaps not insurmountable, these provisions are nonetheless considerable obstacles.

listing on the pre-printed ballot or a candidate seeks to do so depends upon a choice of that political party or candidate, rather than the decision of a voter desiring to cast a write-in vote. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 225-226, n.15 (1989) (In rejecting argument that participation in state-run primaries reflects the party's support for each regulation of the process, the Court recognized that "[a] decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns.")

Whatever the reason for the choice which may be made by a political party or candidate, focus upon the course chosen by a political party or candidate "ignores the independent First Amendment rights" *id.*, of the voters. Indeed, the reason why a candidate might not run in an independent primary, or a new party might not be formed 150 days prior to the primary date are many and varied. The reasons may range from the emergence of new issues, the emergence of new information concerning the candidates, the difficulties presented by the state statutory scheme or a simple lack of resources at an early stage. *See, e.g., Anderson v. Celebrezze*, 460 U.S. at 792 (footnote omitted) ("When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.") But whatever the reason, focus upon that choice ignores the fundamental rights of the voter.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the decision of the Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

EDWARD COPELAND
(Counsel of Record)
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN,
STANDARD, KRINSKY &
LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003-9518
(212) 254-1111

Counsel for Amicus Curiae

NO. 91-535

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

-v.-

MORRIS TAKUSHI, Director of Elections,
State of Hawaii; JOHN WAIHEE, Lieutenant
Governor of the State of Hawaii;

BENJAMIN CAYETANO, in his capacity
as Lieutenant Governor of the State of Hawaii,

Respondents.

AMICUS BRIEF OF COMMON CAUSE/HAWAII
IN SUPPORT OF PETITIONER

THOMAS GRANDE. ESQ.
DAVIS & LEVIN
10 Marin Street
Honolulu, HI 96817
(808) 524-7500

STANLEY E. LEVIN, ESQ.
(Counsel of Record)
DAVIS & LEVIN
10 Marin Street
Honolulu, HI 96817
(808) 524-7500

NO. 91-535

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

-v.-

MORRIS TAKUSHI, Director of Elections,
State of Hawaii; JOHN WAIHEE, Lieutenant
Governor of the State of Hawaii;
BENJAMIN CAYETANO, in his capacity
as Lieutenant Governor of the State of Hawaii,

Respondents.

AMICUS BRIEF OF COMMON CAUSE/HAWAII
IN SUPPORT OF PETITIONER

THOMAS GRANDE. ESQ.
DAVIS & LEVIN
10 Marin Street
Honolulu, HI 96817
(808) 524-7500

STANLEY E. LEVIN, ESQ.
(Counsel of Record)
DAVIS & LEVIN
10 Marin Street
Honolulu, HI 96817
(808) 524-7500

1
TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. INTERESTS OF THE AMICUS CURIAE . .	1
III. SUMMARY OF ARGUMENT	4
IV. THE NINTH CIRCUIT INCORRECTLY APPLIED THE <u>ANDERSON V. CELEBREZZE</u> STANDARD IN NOT VIEWING VOTING AS A FUNDAMENTAL RIGHT	6
V. WRITE-IN VOTING IS REQUIRED TO COUNTER HAWAII'S POLITICAL AND ELECTORAL HISTORY OF ONE-PARTY RULE AND UNOPPOSED INCUMBENT CANDIDATES	9
A. Hawaii is Dominated by the Democratic Party	11
B. Hawaii Incumbents are Generally Unopposed and there is Substantial Voter Expression of Dissatisfaction through the Casting of Blank Ballot	13
C. The State's Justifications for the Voting Ban are Thinly-Veiled Attempts to Protect the Incumbent Majority	20
VI. HAWAII'S SO-CALLED EASY ACCESS TO THE BALLOT SHOULD NOT BE CONSIDERED IN ASSESSING THE CONSTITUTIONALITY OF A WRITE-IN VOTE PROHIBITION	21
VII. CONCLUSION	23

APPENDIX

- 1a. Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Senators Elected Without
Opposition

- 2a. Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Representatives Elected
Without Opposition

- 3a. Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Senators Elected at
Democratic Primary

- 4a. Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Representatives Elected
at Democratic Primary

iii
TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>American Party of Texas v. White</u> 415 U.S. 767 (1974)	7
<u>Anderson v. Celebrezze</u> 460 U.S. 780 (1983)	5, 10, 21, 22
<u>Bullock v. Carter</u> 405 U.S. 134 (1972)	22
<u>Burdick v. Takushi</u> 937 F.2d 415 (9th Cir. 1991)	1, 19 20, 21
<u>Burdick v. Takushi</u> 737 F.2d 582 (D. Hawaii 1990).	5
<u>Clements v. Fashing</u> 457 U.S. 957 (1982)	7
<u>Eu v. San Francisco County Democratic Committee</u> 489 U.S. 214 (1989)	9
<u>Guinn v. United States</u> 238 U.S. 347 (1915)	7
<u>Jenness v. Fortson</u> 403 U.S. 431 (1971)	12
<u>Reynolds v. Sims</u> 377 U.S. 533 (1964)	6, 7, 8, 10
<u>Socialist Labor Party v. Rhodes</u> 290 F. Supp. 983 (S.D. Ohio E.D. 1968)	8, 12
<u>Storer v. Brown</u> 415 U.S. 724 (1974)	7

iv
TABLE OF AUTHORITIES - Continued

<u>Sweezy v. New Hampshire</u>	
354 U.S. 234 (1957) . . . . .	.12, 19
 <u>Wesberry v. Sanders</u>	
376 U.S. 1 (1964) . . . . .	.6
 <u>Williams v. Rhodes</u>	
393 U.S. 23 (1968). . . . .	.6, 10

CONSTITUTIONAL PROVISIONS

U.S. Const. article I, section 2 . . . .	.6
U.S. Const. article I, section 4, cl. 1	7
U.S. Const. First Amendment	1, 6
U.S. Const. Fourteenth Amendment . . .	.1, 6
Hawaii Const. article III, section 4 .	.13, 14

STATUTES

Hawaii Revised Statutes section 11-151 (1991 Supp)	15
---	----

COURT RULES

U.S. S. Ct. R. 37	1
-----------------------------	---

TABLE OF AUTHORITIES - Continued

OTHER AUTHORITIESHawaii State Data BookDepartment of Business and
Economic Development

State of Hawaii (1990) 11, 18

Results of Votes Cast

Office of the Lt. Governor

State of Hawaii (1982-1988) . . .18

Results of Votes Cast

Office of the Lt. Governor

State of Hawaii (1990) 13, 15

Session Laws of Hawaii

Regular Session of 199011

I. INTRODUCTION

Amicus Common Cause/Hawaii submits this brief pursuant to Rule 37 of this Court in support of Petitioner Alan B. Burdick and urges that the decision in Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991) be reversed and that Hawaii's write-in voting ban be found violative of the First and Fourteenth Amendments to the U.S. Constitution. Written approval for the submission of this brief by Petitioner Alan Burdick and Respondents is attached to this brief.

II. INTERESTS OF THE AMICUS CURIAE

Amicus Common Cause/Hawaii is a public interest lobbying group which has operated a staffed office in the State of Hawaii for eighteen years. It has fifteen hundred members in the State of Hawaii. Common Cause/Hawaii works to ensure and encourage full public participation in the electoral and legislative processes through lobbying, public

education and community organizing. Through its operations, Common Cause/Hawaii has actively encouraged full citizen participation in the electoral process through working to ensure that the rights of voters are fully protected and extended.

Amicus Common Cause/Hawaii has filed this brief in part because this Court must consider the electoral realities of Hawaii in order to properly assess the constitutional infirmity of the Hawaii write-in voting ban.

In the view of Common Cause/Hawaii, the Ninth Circuit should have upheld Petitioner's right to cast write-in ballots without reference to the political situation in Hawaii. But once the Ninth Circuit undertook to "balance" the voter's right in the context of Hawaii's political situation, it should have done so in a proper manner and considered how the rights of Hawaii voters are affected by the voting ban.

Hawaii elections are dominated by one party and by incumbents who run unopposed. At each election, thousands of voters express dissatisfaction with the single-choice available by casting blank ballots or by not voting at all. It is these disaffected voters whose rights must be balanced against the state interest in the voting ban. The Ninth Circuit incorrectly weighed the narrow interests of candidate placement on the ballot (so-called "easy access") to evaluate the effect of the ban on Hawaii's voters. Instead, the Ninth Circuit should have determined the effect of the ban on the Hawaii electorate as a whole and determined its practical effect on voters' rights in Hawaii.

Common Cause/Hawaii has a deep-seated interest in ensuring that a class of individuals -- those dissatisfied by one-party political domination and incumbent-dominated elections -- have the right to freely express

themselves in the voting booth. In Hawaii elections where there is only one candidate, more than twenty-five percent of the voters appearing at an election do not cast a vote for the unopposed candidate. It is these voters who have not been considered by the Ninth Circuit and it is these voters for whom this Court must preserve a meaningful right to vote for the candidate of their choice.

III. SUMMARY OF ARGUMENT

The right to vote under the U.S. Constitution is a fundamental right of political expression and political association. Hawaii's total ban on write-in voting is constitutionally infirm and shakes the very foundation of our constitutional democracy -- it stops a class of Hawaii citizens from exercising the right to vote. Those citizens who are dissatisfied with one-party domination and incumbent domination are

totally deprived of the right to express their alternative choices through the ballot box.

In applying the Anderson v. Celebrezze, 460 U.S. 780 (1983) balancing test, the Ninth Circuit ignored the voter's interest in freely exercising his constitutional right to vote and incorrectly focused on the interests of candidate access to the ballot. The Hawaii District Court correctly balanced the interests of the voter, not the candidate, against Respondent's rationale for the Hawaii voting ban and found that it "burdens the right to freely vote for the candidate of one's choice, and implicates the rights of free expression and association." Burdick v. Takushi, 737 F. Supp. 582, 591 (D. Hawaii 1990). Instead of the looking to the rights of the candidate, the Ninth Circuit should have assessed the character and magnitude of the Hawaii voting ban on the Hawaii electorate as a whole, particularly that class

of disaffected voters whose rights of expression are impaired by the voting prohibition.

**IV. THE NINTH CIRCUIT INCORRECTLY
APPLIED THE ANDERSON V. CELEBREZZE
STANDARD IN NOT VIEWING VOTING AS A
FUNDAMENTAL RIGHT**

The right to vote -- to participate as a voter in an election -- is a fundamental right protected by the First and Fourteenth Amendments to the U.S. Constitution. Reynolds v. Sims, 377 U.S. 533, 544-555 (1964). Article I, section 2 of the U.S. Constitution grants qualified individuals "a constitutional right to vote and to have their votes counted." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Id. The right to vote "rank[s] among our most precious freedoms." Williams v. Rhodes, 393

U.S. 23, 30 (1968). Thus, this Court has "repeatedly recognized that all qualified voters have a constitutionally protected right to vote." Reynolds v. Sims, 405 U.S. 533, 554 (1964).

The right to vote is a right that cannot be denied outright, Guinn v. United States, 238 U.S. 347 (1915), although the U.S. Constitution does grant to the states the power to regulate the time, place and manner of elections. U.S. Const. article I, section 4, cl. 1. Based upon this constitutional mandate, this Court has allowed and upheld reasonable regulation of elections, candidates and political parties. E.g., American Party of Texas v. White, 415 U.S. 767 (1974), Clements v. Fashing, 457 U.S. 957 (1982) and Storer v. Brown, 415 U.S. 724 (1974).

Although reasonable restrictions may be imposed on the time, place and manner of voting, "[t]he right to vote freely for the

candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1963). Significantly, the right to vote does not exist in a vacuum since the protection extends not only to the act of casting a ballot itself, but also extends to the right to vote "freely for the candidate of one's choice." Id. (emphasis added). This means that for the right to vote to be properly exercised, the voter "is entitled to vote for any candidate of his choice, subject to reasonable conditions and qualifications imposed by the State." Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 987 (S.D. Ohio E.D. 1968), affirmed in part and modified in part sub nom Williams v. Rhodes 393 U.S. 23 (1968).

These maxims of constitutional protection are not mere statements of belief-

- they are the foundational tenets of our constitutionally protected right to vote. Because the right to vote is so intimately intertwined with the right to free speech-- the right to express one's views -- this Court has continually applied the strictest standard in addressing the validity of a constitutional ban on expression. Thus, the Ninth Circuit should have applied the more stringent standard articulated in Eu v. San Francisco County Democratic Committee, 489 U.S. 214 (1989), that requires the challenged action to be narrowly tailored in pursuit of a compelling governmental interest.

V. WRITE-IN VOTING IS REQUIRED TO COUNTER HAWAII'S POLITICAL AND ELECTORAL HISTORY OF ONE-PARTY RULE AND UNOPPOSED INCUMBENT CANDIDATES

Hawaii's political and electoral history of one-party rule and unopposed incumbent candidates graphically demonstrates the need for the complete exercise by Hawaii voters of

their constitutionally-mandated franchise. This Court has long recognized the need to consider the electoral environment in which electoral rights have been restricted. E.g., Reynolds v. Sims, 377 U.S. 533 (1963)(apportionment) and Williams v. Rhodes, 393 U.S. 23 (1968)(political party access). Thus, in determining whether a particular state election law is violative of a federal constitutional right, this Court has considered and has assessed "the facts and circumstances behind the law", including voting patterns and other relevant circumstances. Id. at 30, 34. In other words, in order to assess "the character and magnitude of the asserted injury to the rights protected", Anderson, supra 460 U.S. at 789, this Court must assess the electoral context within which those rights are exercised.

Hawaii's most recent electoral history shows a restrictive pattern of one-party

domination and incumbent re-election, including re-election without opposition.

A. Hawaii is Dominated by the Democratic Party

The Democratic Party has dominated Hawaii's elections since well before Statehood in 1959. In 1990 Democrats controlled eighty-eight percent (88%) of the state legislative seats -- forty-five of the fifty-one members of the House of Representatives and twenty-two of the twenty-five members of the Senate. Session Laws of Hawaii, Regular Session of 1990 at iv-vii. The historical trend is similar -- from 1979 through 1989, eighty percent (80%) of Hawaii state legislators were Democrats. Department of Business and Economic Development, State of Hawaii: Hawaii State Data Book at 252.

Democratic domination of Hawaii elections has resulted in electoral patterns that severely limit the ability to dissent at the ballot box, an integral part of electoral

freedom. Cf. Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957)(discussing fundamental right of political expression and association in context of unlawful state investigation of individual). It is one-party domination such as exists in Hawaii that has prompted some federal courts to look to write-in voting in assessing the constitutionality of election laws that might otherwise "freeze the status quo." Jenness v. Fortson, 403 U.S. 431, 438 (1971). See Socialist Labor Party v. Rhodes, 220 F. Supp. 963, 987 (S.D. Ohio E.D. 1968) affirmed in part and modified in part sub nom Williams v. Rhodes, 393 U.S. 23 (1968)("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise.").

B. Hawaii Incumbents are Generally Unopposed and there is Substantial Voter Expression of Dissatisfaction through the Casting of Blank Ballots

Hawaii's one-party domination also results in incumbents running unopposed in alarming numbers. For example, in the 1990 primary election, there were twelve Senate seats to be filled. Five of the twelve seats (42%) were filled by Democratic incumbents who were unopposed at both the primary and general elections. Two additional seats (17%) were decided at contested Democratic primaries. See generally Ninth Circuit Record on Appeal 489 et seq: Office of the Lt. Governor, State of Hawaii, 1990 Results of Votes Cast at 1-2. Thus, a total of fifty-eight percent (58%) of Hawaii's state senators were elected by the time the primary election was concluded. Id. Under the Hawaii Constitution, article III, section 4, primary winners who face no ballot opposition at the

general election (unopposed candidates or candidates elected at the Democratic primary) are deemed elected at the primary election. (Hawaii Constitution, article III, section 4: "If a candidate nominated for a seat at a primary election is unopposed for that seat at the general election, the candidate shall be deemed elected at the primary election.") Thus, voters who did not vote in the Democratic Party's primary never had an opportunity to express their views on who was to represent them in the State Senate.

In the House of Representatives, the electoral figures are similar to the Senate's incumbent-dominated elections. Seventeen of fifty-one (33%) incumbent Democratic representatives were elected without any opposition and an additional nine incumbent Democratic representatives (18%) were elected at contested Democratic primaries. A total of fifty-one percent (51%) of Hawaii's

representatives were elected at the primary level. Office of the Lt. Governor, State of Hawaii, 1990 Results of Votes Cast at 3-7. Again, voters who did not participate in the Democratic Primary never had a voice in these elections.

Voter dissatisfaction in having limited electoral choices is evident from the huge proportion of "blank ballots" -- ballots left blank in an election race by voters who cast votes in other election races. Blank ballots are not tallied as votes cast for a candidate, although blank ballots are counted as votes cast in ratification of a constitutional amendment. Hawaii Revised Statutes section 11-151 (1991 Supp.) These are voters who have physically cast a ballot and have voted in some of the electoral races, but who have purposely not voted in one or more races.

Appendix at 1a-4a sets forth the 1990 primary election results for the five state

Senate races and seventeen state House of Representative races where incumbents were elected unopposed. For the five state Senate races, a total of 10,779 blank votes were cast. This constituted twenty-seven percent (27%) of the voters who were at the polls and voted in other races, but who did not cast a ballot for the unopposed incumbents. For the seventeen state House races a total of 16,220, or twenty-nine percent (29%), of the voters who were at the polls and voted in other races did not cast a ballot for the unopposed incumbents. When compared to the percentage of voters who cast blank ballots in contested elections, the proportion of disaffected voters is staggering. For example, an average of twelve percent (12%) of the electors cast blank ballots in the contested state 1990 Senate primary races, compared to the average of twenty-seven percent (27%) blank ballots in one-candidate races. In the State House

racess, an average of thirteen percent (13%) of the electors cast blank ballots in the contested 1990 primary races, compared to the average of twenty-nine percent (29%) blank ballots in one-candidate races.

Although these figures do not necessarily mean that blank ballots cast would represent write-in votes to be cast, these statistics show that in practical terms, Hawaii voters have no outlet to express their dissatisfaction with incumbent-dominated elections. Clearly when over twenty-five percent (25%) of the voters are deciding not to cast a ballot, there exists an atmosphere of one-party and incumbent domination that cries out for constitutional relief.

Moreover, these numbers are not an aberration. They are consistent with recent electoral history. In the 1982-1988 elections, there were twenty-four, twenty-five, twenty-one and twenty-six legislative

seats, respectively, that were filled with only one candidate on the ballot. Office of the Lt. Governor, State of Hawaii, 1982 - 1988 Results of Votes Cast.

These electoral statistics are more startling when compared to the extremely high electoral participation of Hawaii voters. In the 1990 general election, seventy-eight percent (78%) of the registered voters cast votes. Sixty-three percent (63%) of the registered voters participated in the primary. 1990 State of Hawaii Data Book at 241. Obviously, voters in Hawaii go to the polls in far greater numbers than they vote for unopposed incumbent legislators.

Political reality in Hawaii does not square with the Ninth Circuit reasoning that the Hawaii voting ban "does not restrict the alternative channels available to Burdick for expressing his political views" and that "'ample alternative channels' exist for

Burdick to advance his political views." Burdick v. Takushi, supra, 937 F.2d at 419. As a matter of voting reality, by leaving the ballot blank, thousands of voters at each election show their preference for someone other than the single choice available. Thus, the only alternative available to them is a meaningless one. They have been deprived of one of the fundamental bases of voting rights -- the right to have one's vote counted for the candidate of one's choice, even if that is a minority choice:

Our form of government is built upon the premise that every citizen shall have the right to engage in political expression and association.... History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-251

(1957). In Hawaii, the voices cry out to be heard, but lack a vehicle to vent their expression. Legitimate vehicles of political dissent -- the ballot box -- are foreclosed by the voting ban. Disaffected voters are left with a meaningless option -- to refuse to cast a ballot when a candidate is unopposed.

C. The State's Justifications for the Voting Ban are Thinly-Veiled Attempts to Protect the Incumbent Majority

When viewed against the Hawaii political backdrop, Respondents' interests in upholding the voting ban are shown to be thinly-veiled attempts to preserve the incumbent majority. The proffered justifications -- prevent sore loser candidacies, discourage late blooming candidates and upholding primary automatic seating, Burdick v. Takushi, supra, 937 F.2d at 420-21, all operate in practice to ensure that incumbent candidates and Democratic party candidates are favored in the electoral process.

VI. HAWAII'S SO-CALLED EASY ACCESS TO THE BALLOT SHOULD NOT BE CONSIDERED IN ASSESSING THE CONSTITUTIONALITY OF A WRITE-IN VOTE PROHIBITION

The Ninth Circuit totally failed to consider how the Hawaii's total ban on write-in voting infringes on Burdick's First and Fourteenth Amendment rights because it confused the voter's right to vote for a candidate of his or her choice with the interests of candidates who have "considerable ease of access to the ballot." Burdick v. Takushi, supra, 937 F.2d at 419. The Ninth Circuit did not consider "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." Anderson, supra, 460 U.S. at 789 (emphasis added). The Ninth Circuit upheld the disenfranchisement of Hawaii voters while failing to even consider the interests of the voters themselves. As shown in part V.

supra, the character of the injury is Draconian - - Hawaii totally bans write-in voting. The magnitude of the injury is pervasive - - thousands of Hawaii voters have no mechanism to register their dissatisfaction with the incumbent majority.

Simply stated, the interests of candidates in gaining access to the ballot are not the same as the interests of voters in exercising their choice on the ballot. These rights are distinctive and separate. Although this Court has recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation," Anderson, supra, 460 U.S. at 786, this Court has placed greater importance on a voter's right to vote for the candidate of his choice than on a candidate's right to run for office. Bullock v. Carter, 405 U.S. 134, 142-43 (1972). Moreover, this Court has refused to attach the status of a fundamental right to candidacy.

Id.

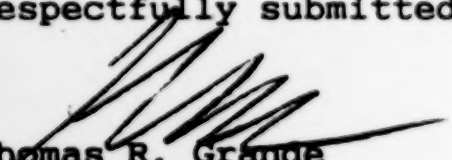
Easy access for a candidate before an election does nothing to assuage the ban on a voter to make his choice at an election. The voter faced with a one-party slate or an unopposed incumbent simply has no choice, see V. supra, and must either vote for the incumbent or not vote at all. Unfortunately, Hawaii's write-in voting ban has forced many Hawaii voters to choose not to vote at all by casting blank ballots.

VII. CONCLUSION

This Court is faced with a decision that will affect the rights of the disaffected voters of Hawaii to exercise meaningful choices at the ballot box. The Ninth Circuit has taken a bold and unprecedented step toward disenfranchising those Hawaii voters who wish to participate -- at the ballot box -- as fully as possible within Hawaii's restrictive voting environment. The Ninth Circuit

decision should be reversed and this Court should declare Hawaii's write-in voting ban to be violative of the First and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,



Thomas R. Grande
DAVIS & LEVIN
10 Marin Street
Honolulu, Hawaii 96817
(808) 524-7500

Stanley E. Levin
(Counsel of Record)
DAVIS & LEVIN
10 Marin Street
Honolulu, Hawaii 96817
(808) 524-7500

Appendix 1a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Senators Elected Without
Opposition

State Senate District 3

Solomon, Malama	8404	75.3%
Blank Votes	2749	24.6
Over Votes	0	0.0

State Senate District 13

Kobayashi, Bert	5143	74.3
Blank Votes	1776	25.6
Over Votes	0	0.0

State Senate District 17

Chang, Anthony K. U.	5697	68.3
Blank Votes	2632	31.6
Over Votes	0	0.0

State Senate District 19

Nakasato, Dennis M.	4090	72.3
Blank Votes	1562	27.6
Over Votes	0	0.0

State Senate District 22

Tungpalan, Eloise	6703	76.4
Blank Votes	2060	23.5
Over Votes	0	0.0

TOTAL BLANK VOTES	<u>10,779</u>
-------------------	---------------

AVERAGE PERCENTAGE OF BLANK VOTES	<u>27%</u>
-----------------------------------	------------

Appendix 2a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Representatives Elected
Without Opposition

State Representative District 2

Tajiri, Harvey S.	3888	55.1%
Blank Votes	3167	44.8
Over Votes	0	0.0

State Representative District 3

Metcalf, Wayne	3303	58.6
Blank Votes	2330	41.3
Over Votes	0	0.0

State Representative District 4

Takamine, Dwight Y.	3213	59.7
Blank Votes	2167	40.2
Over Votes	0	0.0

State Representative District 8

Honda, Herbert J.	4819	78.1
Blank Votes	1347	21.8
Over Votes	0	0.0

State Representative District 10

Baker, Roz	3319	83.6
Blank Votes	650	16.3
Over Votes	0	0.0

Appendix 2a - Continued

State Representative District 13

Bunda, Robert (Bobby)	3443	85.2%
Blank Votes	594	14.7
Over Votes	0	0.0

State Representative District 25

Say, Calvin K. Y.	3502	80.5
Blank Votes	844	19.4
Over Votes	0	0.0

State Representative District 29

Hagino, Dave	2319	73.7
Blank Votes	825	26.2
Over Votes	0	0.0

State Representative District 31

Fukunaga, Carol	2773	77.3
Blank Votes	811	22.6
Over Votes	0	0.0

State Representative District 32

Hirono, Mazie	2369	81.3
Blank Votes	542	18.6
Over Votes	0	0.0

State Representative District 36

Yoshimura, Dwight L.	1990	71.2
Blank Votes	802	28.7
Over Votes	0	0.0

Appendix 2a - Continued

State Representative District 37

Arakaki, Dennis A.	2178	74.5%
Blank Votes	743	25.4
Over Votes	0	0.0

State Representative District 40

Horita, Karen K.	2801	66.7
Blank Votes	1398	33.2
Over Votes	0	0.0

State Representative District 43

Ige, David Y.	4083	76.3
Blank Votes	1264	23.6
Over Votes	0	0.0

State Representative District 44

Yonamine, Noboru (Nobu)	3085	73.1
Blank Votes	1132	26.8
Over Votes	0	0.0

State Representative District 50

Kanoho, Ezra R.	4607	53.4
Blank Votes	4018	46.5
Over Votes	0	0.0

State Representative District 51

Kawakami, Bertha C.	5143	61.9
Blank Votes	3160	38.0
Over Votes	0	0.0

TOTAL BLANK VOTES	<u>16,220</u>
-------------------	---------------

AVERAGE PERCENTAGE OF BLANK VOTES	<u>29%</u>
-----------------------------------	------------

Appendix 3a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Senators Elected at Democratic
Primary

State Senate District 16

Blair, Russell	4963	73.1%
Steelquist, John A.	800	11.7
Blank Votes	1025	15.0
Over Votes	1	0.0

State Senate District 25

Fernandes Salling, Lehua	9454	55.8
Tacbian, Toefilo (Phil)	6004	35.4
Blank Votes	1464	8.6
Over Votes	6	0.0

Appendix 4a

Primary Election - State of Hawaii
1990 Results of Votes Cast

Incumbent State Representatives Elected at
Democratic Primary

State Representative District 15

Bellinger, Reb	1991	46.3%
Beirne, Danielle	1255	29.1
Nakamoto, Guy	721	16.7
Blank Votes	328	7.6
Over Votes	3	0.0

State Representative District 17

Ige, Marshall K.	2653	51.2
Ito, Kenneth (Ken)	1595	30.8
Kaleikini, Lovell F.	598	11.5
Blank Votes	326	6.3
Over Votes	1	0.0

State Representative District 27

Taniguchi, Brian T.	3404	57.9
Hayashi, Virgie	2030	34.5
Blank Votes	436	7.4
Over Votes	2	0.0

State Representative District 33

Tam, Rod	3702	75.5
Fukuda, Keith H.	539	11.0
Kaneshiro, Kenny	187	3.8
Blank Votes	457	9.3
Over Votes	4	0.0

Appendix 4a Continued

State Representative District 38

Alcon, Emilio S.	1499	54.8%
Kubota, Stan	609	22.2
Blank Votes	620	22.7
Over Votes	3	0.1

State Representative District 42

Hashimoto, Clarice Y.	2488	65.2
Morita, Hiroaki (Rocky)	590	15.4
May, Gloria E. (Moana)	144	3.7
Lumpkin, Bobby J.	102	2.6

State Representative District 45

Duldulao, Julie R.	3508	74.2
Vidal, Allen	460	9.7
Blank Votes	752	15.9
Over Votes	4	0.0

State Representative District 46

Oshiro, Paul T.	1983	72.6
Alexander, Jeffrey	508	18.6
Blank Votes	239	8.7
Over Votes	0	0.0

State Representative District 47

Amaral, Annelle	1307	50.8
Wong, Mike	988	38.4
Blank Votes	273	10.6
Over Votes	3	0.1

12
No. 91-535

Supreme Court, U.S.
FILED

MAR 3 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

ALAN B. BURDICK,

Petitioner,

vs.

MORRIS TAKUSHI, Director of Elections, State of
Hawaii; JOHN WAIHEE, Lieutenant Governor of
Hawaii; and BENJAMIN CAYETANO, in his capacity
as Lieutenant Governor of the State of Hawaii,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ARIZONA,
FLORIDA, LOUISIANA, NEVADA, NORTH
CAROLINA, OKLAHOMA, SOUTH DAKOTA,
UTAH, WYOMING, AND THE COMMONWEALTH
OF THE NORTHERN MARIANA ISLANDS, AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS

FRANKIE SUE DEL PAPA*

Attorney General

State of Nevada

*Counsel of Record

KATERI CAVIN

Deputy Attorney General

State of Nevada

Capitol Complex

Carson City, Nevada 89710

(702) 687-4002

Counsel for Amicus

Curiae State of Nevada

(Other Counsel of Record

Listed on Inside Cover)

HON. GRANT WOODS
Attorney General of
Arizona
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4266

HON. ROBERT A.
BUTTERWORTH
Attorney General of
Florida
The Capitol
Tallahassee, Florida
32399-1050
(904) 487-1963

HON. RICHARD P. IEYOUNG
Attorney General
P.O. box 94005
Baton Rouge, Louisiana
70804-9005
(504) 342-7013

HON. LACY H. THORNBURG
Attorney General of
North Carolina
P.O. Box 629
Raleigh, North Carolina
27602-0629
(919) 733-6026

HON. SUSAN BRIMER LOVING
Attorney General of
Oklahoma
2300 N. Lincoln Boulevard,
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105-4894
(405) 521-3921

HON. MARK BARNETT
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, South Dakota
57501-5070
(605) 733-3215

HON. PAUL VAN DAM
Attorney General of
Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1874

HON. JOSEPH B. MEYER
Attorney General of
Wyoming
123 Capitol State Building
Cheyenne, Wyoming 82002
(307) 777-7841

HON. ROBERT NARAJA
Attorney General of the
Commonwealth of the
Northern Mariana
Islands Commonwealth,
Northern Mariana
Islands
Saipan, M.P. 96950
(670) 322-4311

QUESTIONS PRESENTED

1. Whether Hawaii's election code, which affords voters seeking to support particular candidates easy access to the primary election ballot and the opportunity for supported candidates to wage a ballot-connected campaign, is unconstitutional on its face, or as applied, merely because write-in votes are not permitted at either the primary or general election stages?

2. Whether the First Amendment renders the voting booth an unlimited public forum such that, irrespective of whether a State permits individuals to hold office, the State must count and publish all write-in votes cast at all state-run elections?

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT.....	4
ARGUMENT	6
A. Petitioner's Claim that the Constitution Mandates Unlimited Opportunity to Cast Write-in Votes at All State-Assisted Elections Would, if Granted, Nullify the States' Constitutional Discretion to Regulate Elections	6
1. Mandatory Unlimited Write-In Voting is Not Consistent With the Express Language of the Constitution	7
2. This Court's Decisions Grant the States Extensive Discretion to Regulate Their Electoral Processes, and to Choose Whether and How to Allow Write-In Votes	9
i. A Ban On Write-in Voting at the General Election Serves the Compelling Interest of Confining Factionalism and Reserving the General Election for Major Struggles	10
ii. A Ban On Write-in Voting at the Primary Serves the Compelling Interest Of Preventing Strategic Voting	12

TABLE OF CONTENTS - Continued

	Page
iii. A Ban On Write-in Voting Serves Interests in Fostering Voter Education, in Pre-screening Candidates, and Eliminating the Risks of Vote-Buying, Fraud, and Other Evils.....	14
B. The Specific Holdings of this Court, as Well as Other Persuasive Appellate Precedent, Firmly Support A Generous Standard of Review for Hawaii's Election Law, and Affirmance of the Judgment Below Sustaining Hawaii's Exercise of its Authority to Regulate Elections.....	18
C. Both Petitioner and the District Court Have Improperly Exaggerated the Burdens Which Even Stringent Limits on Write-In Voting Place on Available Political Opportunity, and Improperly Valued the States' Important Interests.....	25
D. The District Court's Judgment Cannot Be Reinstated on the Basis of a Public Forum Rationale	29
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES:

<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974)	4, 5, 14, 17, 27
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	<i>passim</i>
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	19, 20
<i>Burdick v. Takushi</i> , 973 F.2d 415 (9th Cir. 1991)	1, 7
<i>Chimento v. Stark</i> , 353 F. Supp. 1211 (D.N.H.), <i>aff'd</i> , 414 U.S. 802 (1973)	14
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982)	16, 22
<i>Cornelius v. NAACP Legal Defense and Educational Fund</i> , 473 U.S. 788 (1985)	6, 29, 30
<i>Democratic Party v. Wisconsin</i> , 450 U.S. 107 (1981)	5, 13, 16
<i>Dixon v. Maryland State Board</i> , 878 F.2d 776 (4th Cir. 1989)	23
<i>Fasi v. Cayetano</i> , 752 U.S. 957 (1982) (D. Haw. 1990) (en banc)	16, 22
<i>Hall v. Simcox</i> , 766 F.2d 1171 (7th Cir.), <i>cert denied</i> , 474 U.S. 1006 (1985)	22
<i>Harden v. Board of Elections</i> , 74 N.Y. 2d 796, 544 N.E. 2d 605, 545 N.Y.S. 2d 686 (1989)	23
<i>Holstein v. Young</i> , 10 Haw. 216 (1896)	17
<i>Gebelein ex rel. State v. Nashold</i> , 406 A.2d 279 (Del. Ch. 1979)	16
<i>Georges v. Carney</i> , 691 F.2d 297 (7th Cir. 1982)	30
<i>Gregory v. Ashcroft</i> , 111 S. Ct. 2395 (1991)	10

TABLE OF AUTHORITIES – Continued

Page

<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	4, 24
<i>Joyner v. Moffard</i> , 706 F.2d 1523 (9th Cir. 1983)	16
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	20, 21, 22
<i>Lynch v. Illinois State Board of Elections</i> , 682 F.2d 93 (7th Cir. 1982)	16
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	4
<i>McClain v. Meier</i> , 851 F.2d 1045 (8th Cir. 1988)	23
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986)	<i>passim</i>
<i>Nixon v. Condon</i> , 286 U.S. 73 (1932)	12
<i>Norman v. Reed</i> , 112 S. Ct. 698 (U.S. 1992)	4, 22, 26, 27
<i>Patterson v. Hanley</i> , 136 P. 821 (1902)	17
<i>Pennhurst State School & Hospital v. Halderman</i> , 465 U.S. 89 (1984)	24
<i>Rainbow Coalition v. Oklahoma State Election Board</i> , 844 F.2d 740 (10th Cir. 1988)	23
<i>Rodriguez v. Popular Democratic Party</i> , 457 U.S. 1 (1982)	12
<i>Rust v. Sullivan</i> , 111 S. Ct. 1759 (1991)	30
<i>Smith v. Allwright</i> , 321 U.S. 649 (1944)	12
<i>Socialist Workers Party v. Munro</i> , 765 F.2d 1417 (9th Cir. 1985)	22
<i>State Administrative Board of Election Laws v. Calbert</i> , 272 Md. 659, 327 A.2d 290 (1974)	23
<i>Stevenson v. State Board of Elections</i> , 638 F. Supp. 547 (N.D. Ill. 1986)	22

TABLE OF AUTHORITIES – Continued

	Page
<i>Storer v. Brown</i> , 415 U.S. 724 (1974) . 2, 4, 11, 14, 15, 21	
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986).....	5, 12
<i>United States v. Kokinda</i> , 110 S. Ct. 3115 (1990)	29
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	<i>passim</i>
STATUTES:	
Alaska Stat. § 15.25.070 (1988)	2
Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989)	3
Ark. Stat. Ann. § 7-5-205 (Supp. 1989)	3
Cal. Elec. Code § 7300 (West 1977 & Supp. 1990) ..	3, 20
Cal. Elec. Code § 7301 (West 1977 & Supp. 1990)	20
Cal. Elec. Code § 18600 et seq. (Supp. 1974)	20
Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989).....	3
Conn. Gen. Stat. § 9-373(a) (1989).....	3
Fla. Stat. § 101.011(6) (1989)	2
Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991).....	3
Ga. Code Ann. § 34A-915 (Harrison Supp. 1988)	3
Ga. Code Ann. § 34A-1124 (Harrison Supp. 1988)	3
Haw. Rev. Stat. § 11-62 (Supp. 1991)	27
Haw. Rev. Stat. § 11-64 (1985).....	27
Haw. Rev. Stat. § 12-3 (1985).....	13

TABLE OF AUTHORITIES – Continued

	Page
Haw. Rev. Stat. § 12-6 (1985).....	13
Haw. Rev. Stat. § 12-41 (1985).....	11, 28
Idaho Code § 34-702A (Supp. 1989)	3
Ill. Ann. Stat. ch. 46, ¶ 17-16.1 (1991)	2
Ind. Code Ann. § 3-8-2.5(e) (Burns Supp. 1991).....	3
Kan. Stat. Ann. §§ 25-213 (1986)	3
Ky. Rev. Stat. § 117.265(3) (Supp. 1990).....	2
Mass. Gen. Laws Ann. ch. 54, § 78A (West 1991)	3
Md. Ann. Code, art. 33, § 5-3(f) (1986).....	3
Md. Elec. Code § 4D-1 (Supp. 1989)	3
Minn. Stat. § 204B.36(2) (1988)	3
Mo. Rev. Stat. § 115.453(4) (1986)	3
Mont. Code Ann. § 13-10-211 (1989)	3
N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991)	3
N.C. Gen. Stat. § 163-151(6) (e) (1987).....	3
N.D. Cent. Code § 16.1-12-02.2 (Supp. 1991).....	3
Neb. Rev. Stat. § 32-428 (1988).....	2, 3
Nev. Rev. Stat. § 293.270(2) (1991).....	2
N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985)	2, 3
N.Y. Elec. Law. § 6-154 (McKinney 1978 & Supp. 1992).....	3
Ohio Rev. Code Ann. § 3513.04 (1989)	2

TABLE OF AUTHORITIES - Continued

	Page
Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991)	3
Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989)	2
Or. Rev. Stat. § 249.007 (Supp. 1991)	3
S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990)	2
Texas Code Ann. (Vernons') § 146.002 (1986)	2
Texas Code Ann. § 172.112 (1986)	3
Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991)	3
Utah Code Ann. § 20-7-20 (1984 & Supp. 1991)	3
Wash. Rev. Code Ann. § 29.04.180 (1965 & Supp. 1991)	3
Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986) ..	2, 22
W. Va. Code § 3-6-5 (1978)	3
Wis. Stat. § 8.16(2) (1986 & Supp. 1991)	3
Wis. Stat. § 8.185(2) (1986 & Supp. 1991)	3
Wis. Stat. § 8.17(3)(a) (1987-88)	3
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. I, § 2	8
U.S. Const. art. I, § 3	8
U.S. Const. art. I, § 4	2, 9
U.S. Const. art. II	8

TABLE OF AUTHORITIES - Continued

	Page
U.S. Const. art. II, § 1	2, 8, 9
U.S. Const. amend. X	9
U.S. Const. amend. XII	9
U.S. Const. amend. XIV, § 3	8
Haw. Const. art. III, § 4 (Supp. 1991)	11
OTHER AUTHORITIES:	
Fredman, <i>The Australian Ballot: the Story of an American Reform</i> 22 (1968)	17

STATEMENT OF INTEREST

The amici States are charged with administering elections for local, State, and National offices within their respective jurisdictions. They have a fundamental interest in this case, in which a Hawaii voter challenges a prohibition placed by Hawaii law on the casting and counting of write-in votes at both the Hawaii September primary and the November election.

Generally avoiding a particularized challenge to State limits on voters' abilities to place their candidates on the printed ballot, Alan Burdick claims the Constitution prohibits a state ban on write-in voting no matter how "extraordinarily liberal" the election law is otherwise. *See* Pet. Br. at 31.

Contrary to Petitioner, the amici States submit they have broad authority to regulate the electoral process, and to do so, consistent with the Constitution, in a way that may well "leave some voters, at some time, without a candidate that they can support" on election day. *Id.* Amici thus will urge that regulation, or even prohibition, of write-in voting at primary or general elections, is constitutional, if adequate access to the printed election ballot is granted to new and minor parties, independent candidates, and voters who support them.

Because the Hawaii election code meets this test, and bars write-in voting for reasons that have been upheld as important and compelling, the amici States submit this Brief in support of the Hawaii election officials and the judgment of the Court of Appeals for the Ninth Circuit. That judgment properly rejected Petitioner's claim that the Constitution guarantees "an unlimited right to [write-in] vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d 415, 419 (9th Cir. 1991).

Amici are concerned that Petitioner's claim, if granted, would cast doubt not only on laws that regulate, or bar, write-in voting, but on the States' general discretion to regulate elections. This discretion is provided by the Constitution's text, *see* U.S. Const. art. I, § 4; *id.* art. II, § 1; *id.* amend. X, and has been repeatedly recognized by this Court. Indeed, this Court has held that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

In contrast, Petitioner's claim, if granted, would threaten laws of well over thirty States. At least six States, including Hawaii, bar write-ins at general, or run-off elections.¹ Seven others bar write-ins for certain general election candidates.² At least 16 States prohibit write-in votes at primary elections.³ And well over twenty

¹ *See* Nev. Rev. Stat. § 293.270(2) (1991); Okla. Stat. Ann. tit. 26, § 71-127 (Supp. 1989); S.D. Codified Laws Ann. § 12-16-1 (1982 & Supp. 1990). *See also infra* note 2.

² *See* Texas Code Ann. (Vernons') § 146.002 (1986) (banning write-ins in run-off elections); Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986) ("no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary"); N.M. Stat. Ann. § 1-12-19.1(E) (Supp. 1985) (to same effect as Washington law); Ohio Rev. Code Ann. § 3513.04 (1989) (same); Ill. Ann. Stat. ch. 46, ¶ 17-16.1 (1991) (barring write-in votes for candidate "who is defeated for his or her nomination at the primary"); *see also* Ky. Rev. Stat. § 117.265(3) (no write-ins for Pres. electors); Neb. Rev. Stat. § 32-428 (1988) (other offices). Louisiana also does not permit write-in votes at the run-off stage, although there is no statute specifically so providing.

³ In addition to Hawaii and the States cited at *supra* n.1, *see* Alaska Stat. § 15.25.070 (1988); Fla. Stat. § 101.011(6) (1989); Ga.

(Continued on following page)

States require often substantial pre-election filings by write-in candidates as a condition of having write-in votes counted for them.⁴ All of these laws, to one degree or another, may work under a variety of circumstances to prohibit a voter from "cast[ing] a write-in vote for the person of his choice." Pet. Br. at 11.

Amici thus disagree with the claim that it is unconstitutional to impose limits on voters whose candidates have not filed timely and sufficient nomination papers,

(Continued from previous page)

Code Ann. § 34A-1124 (Harrison Supp. 1988); Kan. Stat. Ann. §§ 25-213 (1986); Ind. Code Ann. § 3-8-2.5(e) (Burns Supp. 1991); Md. Ann. Code, art. 33, § 5-3(f) (1986); Minn. Stat. § 204B.36(2) (1988); N.C. Gen. Stat. § 163-151(6)(e) (1987); Tex. Code Ann. § 172.112 (1986); W. Va. Code § 3-6-5 (1978); Wis. Stat. § 8.17(3)(a) (1987-88). We understand that Alabama, as a matter of policy, does not permit primary write-in votes.

⁴ *See* Ariz. Rev. Stat. Ann. § 16-312 (1984 & Supp. 1989); Ark. Stat. Ann. § 7-5-205 (Supp. 1989); Cal. Elec. Code § 7300 (West 1977 & Supp. 1990); Colo. Rev. Stat. § 1-4-1001 (1980 & Supp. 1989); Conn. Gen. Stat. § 9-373(a) (1989); Fla. Stat. Ann. § 99.061(3) (West 1982 & Supp. 1991); Ga. Code Ann. § 34A-915 (Harrison Supp. 1988); Idaho Code § 34-702A (Supp. 1989); Mass. Gen. Laws Ann. ch. 54, § 78A (West. 1991); Md. Elec. Code § 4D-1 (Supp. 1989); Mo. Rev. Stat. § 115.453(4) (1986); Mont. Code Ann. § 13-10-211 (1989); Neb. Rev. Stat. § 32-428.10(2) (1989); N.M. Stat. Ann. § 1-12-19.1A (1985 & Supp. 1991); N.Y. Elec. Law § 6-154 (McKinney 1978 & Supp. 1992); N.C. Gen. Stat. § 163-123(a) (1987 & Supp. 1991); N.D. Cent. Code § 16.1-12-02.2 (Supp. 1991); Ohio Rev. Code Ann. § 3513.041 (Anderson 1988 & Supp. 1991); Or. Rev. Stat. § 249.007 (Supp. 1991); Tex. Elec. Code § 192.036 (Vernon 1986 & Supp. 1991); Utah Code Ann. § 20-7-20 (1984 & Supp. 1991); Wash. Rev. Code Ann. § 29.04.180 (1965 & Supp. 1991); Wis. Stat. §§ 8.16(2) & 8.185(2) (1986 & Supp. 1991).

made sufficient preliminary showings of support, survived primary nomination processes, otherwise evidenced compliance with "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," or, for that matter, even shown any interest in serving if elected.⁵

In sum, the position of the amici States is that each State in our Federal system should be free to choose its own way of addressing the policy questions inherent in decisions to allow or not allow write-in votes under particular circumstances. To hold otherwise, amici submit, would eliminate an enormous range of electoral options and improperly subordinate state interests that the courts have long held are important and compelling.

STATEMENT OF THE CASE

The amici States adopt Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

1. In upholding Hawaii's electoral system despite its ban on write-in voting, the Ninth Circuit properly deferred to the State's authority to conduct elections. See *Norman v. Reed*, 112 S.Ct. 698 (U.S. 1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971);

⁵ *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); see *Munro v. Socialist Workers' Party*, 479 U.S. 189, 196 (1986); *Mandel v. Bradley*, 432 U.S. 173 (1977); *American Party v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974).

Williams v. Rhodes, 393 U.S. 23 (1968). This decision correctly heeded principles of Federalism that limit the federal role in regulating the States' electoral processes. See *infra* pp. 6-10.

2. The court of appeals properly held that the burden imposed by Hawaii's ban on write-in voting was justified by Hawaii's compelling interests in regulating its elections. Hawaii grants "easy access to the primary ballot," and "an opportunity to wage a ballot-connected campaign," but also makes the primary "an integral part of the entire election process." *Munro v. Socialist Workers' Party*, 479 U.S. 189, 196, 199 (1986). At the primary, Hawaii law protects against true "party raiding." See *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). At all stages of the electoral process, the ban fosters "informed and educated expressions of the popular will," *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983), allowing election officials "to verify the validity of signatures on . . . petitions, to print the ballots, and, if necessary, to litigate any challenges" to the candidates. *American Party of Texas v. White*, 415 U.S. 767, 787 n.18 (1974). The ban also "'protect[s] the integrity of [the State's] political processes,'" by eliminating an entire class of paper from the voting process and reducing the risk of vote-buying. *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981). Under a straightforward application of *Munro*, or a detailed analysis under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), Hawaii's election law is constitutional.

3. Viewed as a whole, Hawaii law does not seriously burden a voter's right to express support for chosen candidates. Hawaii law allows voters to express

support for candidates in a single open primary for established party candidates, new party candidates, and non-partisan candidates. Although each of these routes have differing risks and burdens, the electoral system as a whole provides adequate political opportunity. Hawaii's regulation of elections thus is constitutional. The argument that this is not a "ballot access" case is without merit.

4. Even if Petitioner has presented the distinct claim that he is entitled to cast a "protest" vote for one or more candidates who are not eligible for placement on Hawaii's primary or November ballot, and to have the vote "counted and published" without any effect on the electoral result, that claim is at odds with the rule that a State may, in a limited forum such as the voting booth, discriminate "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are content neutral." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985). Hawaii's limits on write-in voting meet this test.

ARGUMENT

A. Petitioner's Claim that the Constitution Mandates Unlimited Opportunity to Cast Write-in Votes at All State-Assisted Elections Would, if Granted, Nullify the States' Constitutional Discretion to Regulate Elections.

At the heart of this case is a single Hawaii voter's broad claim that his State must not only allow, but count, publish, and credit, write-in votes without limitation at both its primary and general elections.⁶ Thus, according

⁶ The District Court's injunctions in this case mandated that the Hawaii officials "provide for the counting, recording,

(Continued on following page)

to Petitioner's brief, any time any State "leave[s] some voters, at some time, without a candidate that they can support" (Pet. Br. 31), the First and Fourteenth amendments mandate write-in voting. Thus, Petitioner states, "Hawaii could not escape the issues raised by this case even if it were extraordinary in granting candidates access to the ballot." *Id.* It is this claim that the Ninth Circuit properly rejected in holding that Petitioner "does not have an unlimited right to vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d at 419.

The Ninth Circuit's unsurprising result was mandated not only by the ways which the Constitution itself regulates elections for federal elective office, but by the Constitution's express grants to the States, and more than 20 years of precedent, beginning with *Williams v. Rhodes*, 393 U.S. 23 (1968). In that precedent, this Court has clarified the situations in which neutrally drawn ballot laws could be federally challenged on the basis of their alleged severe burdening of the availability of political opportunity.

1. Mandatory Unlimited Write-in Voting is Not Consistent With the Express Language of the Constitution.

The republican form which the Constitution establishes for our National Government itself strongly suggests that no broad right as is claimed in this case exists

(Continued from previous page)

and tabulation of [all] write-in votes" cast without limit. See Joint Appendix ("J.A.") 77a. Although the District Court's 1986 orders indicated the court would not pass "upon the eligibility of" any person who received a plurality of votes "to take office," *id.*, that proviso was absent from the 1990 injunction.

as a matter of federal constitutional compulsion. As the Ninth Circuit observed, the Constitution itself is replete with provisions that are at odds with a voter's claimed right to vote for whomever he pleases.

Article I, § 2 thus provides that "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Likewise, Article I, § 3 provides that "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Article II, § 1 provides that "No Person except a natural born Citizen . . . shall be eligible to the Office of President" and "neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States." These constitutional commands inexorably displease some voters, who may believe that the Founders did not properly weight the relative benefits of youth over experience, or the importance of residence and citizenship to one's ability to serve. The Fourteenth Amendment itself provided additional qualifications that undoubtedly served to overrule what otherwise would have been the popular vote on election day. U.S. Const. amend. XIV, § 3.

Indeed, the one election the Constitution most closely regulates – that for President and Vice-President – itself contains provisions that are at odds with the notion of "write-in" voting. Thus, in the event no person receives a majority of electoral votes, the House of Representatives may choose only "from the persons having the highest

numbers not exceeding three on the list of those voted for as President."

Likewise, the Senate, to whom falls the task of choosing the Vice-President in the event no person receives a majority of electoral votes for that office, may choose only "from the two highest numbers on the list." U.S. Const. amend. XII.

Applied to its fullest extent, Petitioner's "write-in" voting claim would nullify these "run-off" provisions which prohibit States, when casting their votes for President in the House of Representatives, or the Senate, when choosing a Vice-President, from "writing-in" candidates, even when it is true that those candidates who would be written-in have the overwhelming support of constituents on the day of the election.

The Constitution likewise grants discretion to the States to formulate similar electoral systems that ban or limit write-in votes. Article I, § 4 states that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," while Article II, § 1, states that "Each State shall appoint, [its members of the electoral college] in such Manner as the Legislature thereof may direct." The regulation of State and local elections is thus plainly a power "reserved to the States respectively, or to the people." U.S. Const. amend. X.

2. This Court's Decisions Grant the States Extensive Discretion to Regulate Their Electoral Processes, and to Choose Whether and How To Allow Write-in Votes.

This Court has been cognizant that the substantive – and procedural – requirements a State imposes on its

elected officeholders through the election code reflect "decision[s] of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2400 (1991). If the States' discretion in this area is to be meaningful, it must be that States can, at the least within broad limits, prescribe conditions for election that, in some cases, "leave some voters, at some time, without a candidate that they can support." Hawaii's choice to focus its elections on a printed ballot is thus one way a State may properly exercise its constitutional power over elections.

The States' discretion to ban at least some write-in votes is virtually self-evident. Although Articles I and II do not give "States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions," *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), in interpreting the Constitution in the area of voting rights, the Court has noted that "associational rights [implicated by the right to vote] . . . are not absolute." *Munro v. Socialist Workers Party*, 479 U.S. 179, 193 (1986). That the limits on associational rights support a limitation or even ban on write-in voting is well grounded in the decisions of this Court.

i. A Ban On Write-in Voting at the General Election Serves the Compelling Interest of Confining Factionalism and Reserving the General Election for Major Struggles.

Like the States that ban write-in votes at the November or run-off election, or for broad classes of candidates who have run in the primary and lost, Hawaii's ban on general election write-ins is nothing more than a way of saying the primary should count. This Court has long

upheld the States' ability to define where and how they wish to narrow the primary field:

After long experience, California came to the direct primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections. Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959. A candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates.

Storer v. Brown, 415 U.S. 724, 735 (1974). This power to make the primary count has been "reaffirm[ed]" on many occasions "with unmistakable clarity." *Munro*, 479 U.S. at 194.

Linked to Hawaii's interest in avoiding "unrestrained factionalism" is the obvious desire "to simplify the general election" by eliminating races where a primary winner faces no other opponent who has survived the primary process. Thus, Hawaii's laws mandate the seating of candidates for state legislature and city and county government who emerge from the September primary without balloted opposition. See Haw. Const. art. III, § 4 (Supp. 1991); Haw. Rev. Stat. § 12-41. Likewise, "runaway primary winners" in races for Governor and Congress, or

their parties, have rights to name successors in the "gap" period between the primary and election day. Hawaii thus acts "to protect the mandate of the previous election," *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 13 (1982), in those cases in which only one party fields candidates and no independent candidates survive the September primary process.

As this Court's decision in *Munro* emphasizes, Hawaii is well within its constitutional discretion in "reserv[ing] the general election ballot 'for major struggles' " in this fashion.

ii. A Ban On Write-in Voting at the Primary Serves the Compelling Interest of Preventing Strategic Voting.

Hawaii's ban on primary write-ins, like those of more than a dozen other States, also serves compelling interests and is within the States' power. As this Court's decisions recognize, substantial regulation of primary processes is required if the process of voting is to be a meaningful one. *Cf. Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). The degree of regulation of primary processes, however, requires careful balancing of the interests of the parties, *see Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1987), with the compelling need to provide access to party fora given the reality that, in many districts, or in the State as a whole, party nominating procedures may be the only processes relevant to the November election. Thus, wholly consistent with State efforts to open primary processes up to the general voting public, *see id.* at 222-23 & n.11, States may nonetheless take measures to prevent

true strategic voting at the primary stage so as to preserve a regulatory equilibrium in which voter access to party structures is secured while constitutional challenges to invasion of party structures, *e.g., Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), are effectively forestalled.

Hawaii's ban on primary write-ins is one of several ways the States seek to accommodate their conflicting roles in overseeing primary processes within their States. While Hawaii has an "open primary" "in which all registered voters may choose in which party primary to vote," Hawaii also has adopted statutes that ensure the political parties retain a measure of immunity from the dangerous effects of strategic voting or "party raiding," which occurs typically where the dominant party "raids" another party's primary so as to eliminate the possibility of real competition at the general election. *See Anderson*, 460 U.S. at 789 n.9. Thus, a party candidate must certify that he or she "is a member of the party," Haw. Rev. Stat. § 12-3(b)(7). Hawaii also prohibits the filing of nomination papers "in behalf of any person for more than one party," *id.* § 12-3(c). The ban on write-in voting, coupled with Hawaii's sixty-day pre-primary filing deadline, *see id.* § 12-6, not only vindicates these specific statutes, but provides to the parties the important tool of time in which to defeat a "party raid." By requiring candidates to announce and file sixty days before the primary, Hawaii law allows the parties to challenge candidates who are not bona fide party members, and otherwise allows party members time to campaign against a would-be "party raider."

iii. **A Ban On Write-in Voting Serves Interests in Fostering Voter Education, in Pre-screening Candidates, and Eliminating the Risks of Vote-Buying, Fraud, and Other Evils.**

This Court has also "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. Thus, pre-election filing deadlines that enjoin voters to see to it that their candidates file by a date certain or be barred from casting votes for them have, except in extraordinary circumstances, been upheld. See *American Party of Texas v. White*, 415 U.S. 767, 787 & n.18, 788 (1974). Filing deadlines, like candidate residency requirements, do "not act as an outright ban on anyone's candidacy," and therefore have "only a negligible impact on the voters' right to have a meaningful choice of candidates." *Chimento v. Stark*, 353 F. Supp. 1211, 1216, 1217 (D.N.H.), *aff'd*, 414 U.S. 802 (1973).

In the context of Hawaii's generally liberal access to the primary ballot and opportunities to wage ballot-connected campaigns, Hawaii's ban on write-in voting operates similarly to the laws of more than half the States, which regulate write-in voting in such a way to prohibit the counting of write-in votes for candidates who fail to file statements of candidacy, or otherwise register for the election. In fact, since the only reason Mr. Burdick had anything to complain about was the failure of candidates to file in the Democratic primary for state legislature by July 24, 1986, this case, at most, is about the propriety of such a filing deadline. See *Storer v. Brown*, 415 U.S. at 736 (even if other provisions of election code were invalid, candidates would "still properly [be] barred").

Hawaii's ban on write-in voting, together with its filing deadlines, operates neutrally, and serves numerous important interests. In fact, by making the deadlines "stick," Hawaii has taken the view that electoral competition will be better served by procedural regularity than by the more chaotic approach taken by other States. Cf. *Storer*, 415 U.S. at 730.

Given the realities of political fundraising, and the opportunities for well-heeled candidates to undercut their less wealthy opponents by a last minute campaign, establishment of default dates is essential to the hopes of many unknown candidates who undoubtedly would not enter the race at all if other candidates, particularly those with large personal or organizational resources at their disposal, could join the fray any time on a write-in campaign. This is especially true for offices with small constituencies and low pay, where the threat of late-blooming candidacies can discourage all but the irrationally committed from the sort of extended grass roots campaigning necessary if a new or minor party candidate is to have a serious chance of victory. Cf. *Anderson v. Celebrezze*, 460 U.S. at 790-96 (noting opposite concerns for new and minor party candidates for President, as major party candidates are chosen in national processes that conclude in the summer).

Moreover, filing deadlines secure "the State's interest in fostering informed and educated expressions of the popular will" (*id.* at 796) by granting voters, and the press, a minimum period in which to study the candidates, and, particularly in races of lesser notoriety, to find out what the election is really about. Under unlimited write-in schemes, it is "easy to visualize that an unscrupulous person or group of persons might deliberately

refrain from filing as candidates and then at the moment before the polls close, appear and elect themselves . . . by writing in their names on a ballot." *Gebelein ex rel. State v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979). By prohibiting write-in votes and remanding voters to the procedures for nominating candidates to the printed ballot, Hawaii vindicates "the right of the electorate to be fully informed as to whom is seeking office and what they stand for." *Id.* Thus, Hawaii seeks to correct the distortions in the electoral marketplace caused by late-blooming candidacies, and thereby " 'protect the integrity of its political processes from frivolous or fraudulent candidacies.' " *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981).

A State's interest in enforcing filing deadlines, however, extends beyond these "market corrective" goals, for a State has a compelling interest in taking off the ballot altogether candidates who do not meet minimum age, residency, or other neutral requirements "that serve legitimate state goals which are unrelated to First Amendment values." *Anderson*, 460 U.S. at 789 n.9. For example, Arizona and Texas, in addition to Hawaii, have enacted "resign-to-run" laws which are enforced in part by the limitations on write-in voting in those States. *See Fasi v. Cavetano*, 752 F. Supp. at 950 n.4 (comparing *Clements v. Fashing*, 457 U.S. 957 (1982), and *Joyner v. Moffard*, 706 F.2d 1523 (9th Cir. 1983)). Pre-election filing deadlines are thus not only "justified by administrative concerns," *see Anderson*, but also exist to "ensur[e] that governmental processes are not disrupted by vacancies." *Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 97 (7th Cir. 1982) (dealing with situation of post-election vacancy). They also afford the States the opportunity to require of write-in candidates a showing of support, willingness to serve,

and compliance with other neutral requirements upon which nomination may be lawfully conditioned. *See American Party of Texas*, 415 U.S. at 787 n.18. At least in the context here, where Petitioner brings a purely facial challenge to Hawaii's ban on write-in voting, his inability to point to any write-in candidate who even sought to file nomination papers renders his constitutional claim meritless.

Finally, whether they choose to exercise it or not, the States plainly have the discretion to implement methods of voting that eliminate the potential for vote-buying, whereby the system of free elections is subordinated by powerful interests. As the Supreme Court of California observed ninety years ago, the broad allowance of write-in voting permits voters to "writ[e] the name of any other elector, or even his own name, in the blank column, under the title of any office, as might be agreed between him and a person purchasing or coercing his vote." *Patterson v. Hanley*, 136 P. 821, 823 (1902). While California has chosen not to strike so hard at vote-buying, Hawaii, whose courts justified Hawaii's ban on write-in votes early on as intended "to secure secrecy of the ballot," *Holstein v. Young*, 10 Haw. 216, 222 (1896), has for close to a century sought to implement a strong version of the Australian ballot reform. Hawaii's interest in preventing a return to the system described as one in which "the electoral system was riddled with abuses" including a "quite alarming" prevalence of "bribery"⁷ deserves this Court's respect as a device to "protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. at 788.

⁷ See Fredman, *The Australian Ballot: The Story of an American Reform* 22 (1968).

B. The Specific Holdings of this Court, as Well as Other Persuasive Appellate Precedent, Firmly Support A Generous Standard of Review for Hawaii's Election Law, and Affirmance of the Judgment Below Sustaining Hawaii's Exercise of its Authority to Regulate Elections.

Even putting to one side the compelling State interests that justify limitations on write-in voting, the precedents of this Court firmly rebut the conclusion that there is any *per se* right to cast write-in votes as Petitioner claims. Indeed, in addition to this Court's reasoning in particular cases, the specific holdings of this Court's decisions in the election field support the Ninth Circuit's judgment upholding Hawaii's law.

Williams v. Rhodes, 393 U.S. 23 (1968), in which an extremely restrictive set of election laws intersected to "make it virtually impossible for any party to qualify on the ballot [for President] except the Republican and Democratic parties," *id.* at 25, provides the starting point for analysis here.

Ohio's laws at issue in *Rhodes* – the only laws ever to provoke a write-in voting directive from this Court – warrant close scrutiny. As the Court noted in *Rhodes*, Ohio's 1968 code required, for those seeking to support third party presidential candidates: (1) collection of "petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election"; (2) filing of the petitions by February 7 of the election year, eight months before election day; (3) collection of signatures from those who had never voted in a previous election, as well as, at the primary stage, and (4) formation of a "state central committee" composed of "two members from each congressional district and county central committees for each county," and election

of "delegates and alternates" to a national convention, a requirement, in short, that the new party find "over twelve hundred members who had not previously voted in another party's primary, and who would be willing to serve as committeemen and delegates." *Rhodes*, 393 U.S. at 24-25 & n.1, 26.

Because of these "burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent [dissident] voters from every getting on the ballot," this Court affirmed the judgment striking down the Ohio requirements at issue, and affirmed a grant of "relief to the extent of [allowing the Socialist Labor Party to have] the right, despite Ohio laws, to get the advantage of write-in ballots." 393 U.S. at 34. Write-in voting, as viewed in *Rhodes*, was thus perceived by the majority as a possible *remedy* to otherwise grossly burdensome election schemes, and not, as Petitioners would have it, a *right* in and of itself.

Since *Rhodes*, this Court has confronted numerous election schemes, and never has it even intimated that the availability of unrestricted write-in votes, in any form, is a necessity for the States. In *Bullock v. Carter*, 405 U.S. 134 (1972), which dealt with Texas's primary election filing fees, the Court noted that "write-in votes are not permitted in primary elections for public office," but held, in the face of this observation, that "Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." *Id.* at 137, 143. "Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby [only] tending to limit the field of candidates from which voters might choose." *Id.* at 143. Although Texas's "patently exclusionary" filing fees were struck down as "irrational" with

respect to Texas's goal of eliminating "spurious candidates," *id.* at 143, 146, and as improper with respect to Texas's goal of requiring private sources to bear the cost of elections, *id.* at 147-48, nothing in the Court's language in *Bullock* at all suggests that write-in voting itself was constitutionally guaranteed.

Likewise, in *Lubin v. Panish*, 415 U.S. 709 (1974), this Court addressed California's election code, which allows write-in votes, but which on a number of fronts regulates the circumstances in which write-in votes may be cast.⁸ The Court struck down California's mandatory filing fees solely on the ground that "California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters." *Id.* at 718.

Lubin is instructive for this case as it makes clear the State's interest in "limiting the size of the ballot in order to 'concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford

⁸ See Cal. Elec. Code § 7300 (West, 1990) ("Every person who desires to be a write-in candidate and have his or her name as written on the ballot of an election counted for a particular office shall file: (a) A statement of write-in candidacy" providing "(1) Candidate's name. (2) Residence address. (3) A declaration stating that he or she is a write-in candidate. . . . and (b) [t]he requisite number of signatures on the nomination papers [for other candidates]"; *id.* § 7301 (must be filed with officials "no later than the 14th day prior to the election"). These terms are not substantially different from those described at Cal. Elections Code § 18600 et seq. (Supp. 1974), referred to in *Lubin v. Panish*, 415 U.S. at 710-11.

to the voters the opportunity of exercising more discrimination in their use of the franchise.' " 415 U.S. at 712. Thus, the Court emphasized that in constitutionally acceptable state electoral systems "[i]t is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues," but "[t]his does not mean every voter can be assured that a candidate to his liking" will be available to support. *Id.* at 716. The Court's remedial order in *Lubin* in no way indicates that write-in voting would be necessary to meet constitutional standards, and, in fact the Court's precise language suggests just the opposite.

The Court, for example was well aware that "[t]he California statute provides for the counting of write-in votes [only] subject to certain conditions." 415 U.S. at 710-11. Yet its remedial order in no way suggests these conditions ought to be eliminated. See also *Storer v. Brown*, 415 U.S. 724, 736 (1974) (referring to the regulated "write-in alternative provided by California law" (citing the identical limited write-in law)).

This unsurprising result meshed with the *Lubin* Court's realistic assessment of the role of write-in voting in modern politics. Because "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot," the constitutional value of even regulated write-in voting schemes to state electoral systems "appears dubious at best." 415 U.S. at 719 n.5. Thus, a state system of write-in voting route is neither sufficient, *nor* necessary, to sustain the constitutionality of election laws.

This Court's more recent cases have not only followed *Lubin's* disparagement of the significance of write-in voting, see *Anderson*, 460 U.S. at 799 n.26; cf. *id.* at 808 (Rehnquist, J., dissenting) (lack of write-ins is "squarely held" to be "of no relevance"), but amplify the precedential basis for Hawaii's ban. Thus, in *Munro v. Socialist Workers Party*, 479 U.S. 179 (1986), this Court sustained Washington's "blanket primary" restrictions on new and minor party candidates, despite the fact that Washington law not only provides "[t]hat no write-in vote for a partisan office at a general election shall be valid for any person who has offered himself as a candidate for such position for the nomination at the preceding primary," Wash. Rev. Code Ann. § 29.51.1704 (Supp. 1986), but that write-in candidacies, where they are allowed, must also meet conditions as to timing, filing, and support. See *id.* § 29.51.170 (Supp. 1990). See also *Socialist Workers Party v. Munro*, 765 F.2d 1417, 1419 (9th Cir. 1985) (noting Washington's partial write-in ban).⁹

A reading of this Court's precedents which supports Hawaii law here is also supported by the weight of persuasive case law in the courts of appeals, and in the State appellate courts. As Judge Posner wrote for the court in *Hall v. Simcox*, 766 F.2d 1171, 1175 (7th Cir.), cert. denied, 474 U.S. 1006 (1985):

⁹ Compare also *Norman v. Reed*, 112 S. Ct. 698 (1992) (upholding Illinois' 2% signature filing requirements), with *Stevenson v. State Board of Elections*, 638 F. Supp. 547, 552 (N.D. Ill. 1986) (noting Illinois limits on write-ins), and *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding Texas's resign-to-run-law), with *Fasi v. Cavetano*, 752 F. Supp. 942, 950 n.4 (D. Haw. 1990) (en banc) (noting write-ins for Texans subject to resign to run law are barred).

In general the danger zone does not even begin until a state goes above 2 percent [in its party qualification petition requirements]; and while under the precedents a 2 percent requirement, or in special cases an even smaller requirement, see *Libertarian Party v. Beermann*, 598 F. Supp. 57, 60 (D. Neb. 1984), could be struck down if combined with other restrictions – and some states are ingenious in devising such restrictions, see Blackman, Third Party President? An Analysis of State Election Laws, ch. 4 (1976) – we do not think that barring write-in votes, the only other restriction in Indiana's law that the Communist party has cited to, can put the plaintiff over the hump; as a practical matter it is a trivial distinction.

Likewise, as the Tenth Circuit has observed, so long as a State otherwise provides sufficient opportunity to place candidates' names on the ballot, "we do not think that the lack of write-in votes is, as a practical matter, a significant distinction." *Rainbow Coalition v. Oklahoma State Election Board*, 844 F.2d 740, 745 n.8 (10th Cir. 1988). The Eighth Circuit even went so far as to rule that the refusal to count write-in votes did not even present a substantial federal question. *McClain v. Meier*, 851 F.2d 1045 (8th Cir. 1988). Other courts have persuasively upheld bans on write-in voting at the primary stage. See *Harden v. Board of Elections*, 74 N.Y.2d 796, 544 N.E.2d 605, 606, 545 N.Y.S.2d 686 (1989) (rejecting the equitable remedy of write-in voting to allow party the "opportunity to ballot" a candidate); *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, ___, 327 A.2d 290, 299 (1974) ("the write-in privilege . . . is inconsistent with the whole theory of primary elections'") (citation omitted), cert. denied, 419 U.S. 1110 (1975); but see *Dixon v. Maryland State Board*, 878 F.2d 776 (4th Cir. 1989).

The conclusion to be drawn from these precedents is that State election schemes are to be evaluated according to a generous standard when it comes to their regulation of write-in voting. Indeed, as a general matter, in the absence of dilution of the vote in violation of Equal Protection principles, or sheer irrationality in a state's nominating procedures, this Court has exercised its power of judicial review to nullify state limits on voter choice only if those laws, "in the context of [a State's] system[.]" *Anderson*, 460 U.S. at 803, and "taken as a whole[.]" make it "virtually impossible" for dissident votes to be counted, *Williams*, 393 U.S. at 34, and "freeze the political status quo," *Jenness*, 403 U.S. at 438.

The amici States submit that this broad standard is one that is appropriate for the federal Constitution, which must govern all the States and Territories, each with their own unique circumstances, history, and political traditions. To be sure, courts in the amici States may well interpret their state constitutions to operate more restrictively on the legislature's discretion. This, of course, is a natural development in our Federal system, where State courts, in interpreting a state constitution, properly have the last word. Petitioner relies heavily on these cases, but ultimately admits that they bespeak of state law only, and concerns which should not control a federal equity court's authority over the States, particularly in election matters. See generally *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

In the next section, the amici will show that Petitioner fails to meet this Court's standards for evaluation of First Amendment challenges to electoral limits, or, for that matter, any standard that could be applied to write-in voting limits.

C. Both Petitioner and the District Court Have Improperly Exaggerated the Burdens Which Even Stringent Limits on Write-In Voting Place on Available Political Opportunity, and Improperly Valued the States' Important Interests.

Petitioner argues that Hawaii's ban on write-in voting renders the vote in that State "ineffective," "unacceptable," and "utterly meaningless" (Pet. Br. at 19, 21), but this could not be true under this Court's First Amendment jurisprudence.

Petitioner suggests that his only "alternative channel" is to "pass out leaflets to express his opposition to the candidates listed on the ballot" (Pet. Br. at 22), but this claim is quite erroneous. The essence of the Ninth Circuit's holding in this case was that Hawaii provides sufficient access to the *printed* election ballot, thereby meeting Mr. Burdick's claim.

While Mr. Burdick, like many litigants challenging state election laws, labors long to prove the importance of the right to vote, that is not a point with which the amici States disagree. Rather, it is the very *reason* for the vote's importance that leads to the conclusion that it is wrong to focus on the availability merely of write-in voting on election day.

Petitioner's whole case effectively rests on his statement that "[e]lections are a dynamic part of political discourse and growth within a democratic community," and, hence, "voting involves far more than the static choice among candidates listed on the ballot." Pet. Br. at 17. The import of this truth, however, is not that write-in voting must be granted in unlimited fashion. Rather, the lesson to be drawn is that political opportunity depends

upon the availability of the legal system as a whole to those seeking to *place* candidates on the ballot.¹⁰

Our entire system of dual republican government rests on the proposition that there will be "gaps" in the process whereby changes in events may cause the electorate to become dissatisfied with the choices available at any particular time. The gaps at election time between filing deadlines and election day are thus reflective of larger gaps between elections themselves, during which time the electorate must rely on the system of checks and balances, together with the processes for impeachment and recall, to effect a legal transfer of power. Precisely because write-in votes, where they are allowed, must be taken seriously, Petitioner's claim in this case is nothing less than a challenge to republican forms of government generally. Whatever else it might be, the burden of republican government does not rise to the level of constitutional infirmity.

Seen in this light, Hawaii's law, like that of those other States which ban or regulate write-in votes, does not "seriously burden[] the expressive and participatory aspects of the constitutional right to vote" (Pet. Br. 36). For example, Hawaii's 1 per cent rule for new party petitions guarantees any group the ability to place candidates on the November ballot by formation of a new

¹⁰ Thus, the Constitution protects rights "of likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters." *Norman v. Reed*, 112 S. Ct. at 705. There is no mandate for *unlimited* "opportunities [for] all voters," but rather for "access . . . to the ballot" consistent with the States' "weighty" interests. *Id.* In contrast, Petitioner states it is "no answer" to urge that "easy access to the ballot" is granted. Pet. Br. at 30.

"party." Under the construction of the "new party" route given by Hawaii's Lieutenant Governor, the "new party" route is an effective one as well for independent candidates who may seek to run free of the burdens of large-scale party organization. This Court has described a 1 per cent requirement similar to Hawaii's as "relatively lenient," see *Williams v. Rhodes*, 393 U.S. at 33 n.9, and, only weeks ago, upheld a signature requirement that was, numerically, almost six times as high as Hawaii's demand for roughly 4,200 signatures. See *Norman v. Reed*, 112 S. Ct. at 708 (U.S. Jan. 14, 1992).

Hawaii law takes other steps to alleviate the burdens of its "new party" route. The State, for example, provides extensive time in which to gather the signatures, and permits voters to sign one or more "new party" petitions without pledging to support the new party, or waive their rights to vote in another party's primary. See Haw. Rev. Stat. §§ 11-62 - 11-64. And, while Petitioner complains that the filing deadline (late April) is "extraordinarily early" (Pet. Br. at 31 n.21), Hawaii's 150-day pre-primary deadline is comparable with those this Court has approved. See *American Party of Texas v. White*, 415 U.S. at 787 n.15 (120 day pre-election deadline, combined with the possibility that the pool of signers may be "severely reduced" because Texas prohibits "any elector's casting more than one vote in the process of nominating candidates").

What is particularly disturbing about Petitioner's characterization of the "burdens" of Hawaii law is that Hawaii is not only a "petition" State, where voters can assure November ballot position by gathering sufficient signatures. Like Washington, Hawaii's primary permits independent candidates to sweep into the November

election with a miniscule showing of initial support. Under Hawaii law, nonpartisan candidates may obtain placement on the primary ballot with, at most, 25 signatures, and they are guaranteed November ballot position if they poll at the primary 10 per cent of the vote cast for the office, or the number of votes obtained by the party candidate who obtained the fewest number of votes, whichever is smaller. See Haw. Rev. Stat. § 12-41. This procedure, as this Court noted in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), "is more accommodating of First Amendment rights and values," because in a pure petition State "if a candidate fail[s] to satisfy the qualifying criteria, the State's voters ha[ve] no opportunity to cast a ballot for that candidate and the candidate ha[s] no ballot-connected campaign platform from which to espouse his or her views." *Id.* at 198. Hawaii thus "virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought – candidate access to a state-wide ballot. This is a significant difference." *Id.* at 199.

Given this fact, Petitioner retreats into an argument that "[t]his is not a ballot access case," and the related view that any restriction on election-day choice renders the vote "meaningless" (Pet. Br. at 19-23), coercive (*id.* at 23-25), and impermissibly "discriminatory" (*id.* at 25-32). But these contentions are all unconvincing. But for the argument that this case does not involve the potential for unlimited ballots, this case is just as much a "ballot access" case as any others this Court has decided since *Williams v. Rhodes*. Petitioner does not simply seek the right to protest, but to cast a "vote" that, if joined by others in sufficient numbers, can transfer legal power over the institutions of Government. As this Court has

observed on many occasions, " 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.' " *Anderson, supra*, 460 U.S. at 786. The consequences of accepting Petitioner's absolutist view of the right to "vote" – as opposed to the right to "protest" – is that *no* State regulation of the electoral process is valid. The plain text of the Constitution, and this Court's decisions, more than answer this novel, expansive, and limitless contention.

D. The District Court's Judgment Cannot Be Reinstated on the Basis of a Public Forum Rationale.

In the final part of its opinion, the District Court suggested that the State would have to "count and publish" write-in votes, but did not give any guidance as to what that means. The court suggested that it was treating the voting booth like a "public forum," and that, at the least, the State must "count and publish" protest votes even if they do not affect the election. Petitioner's focus on the ballot box as a vehicle for conveying "his message of dissent," whether his candidate could serve (Pet. Br. 30), indicates that what is truly at issue is a subsidy at the ballot box for pure protest speech.

This analysis of voting as solely a vehicle for expression is divorced from the right to vote – and is insupportable. As the plurality observed in *United States v. Kokinda*, 110 S. Ct. 3115, 3123 (1990), a State's "generous accommodation of some types of speech testifies [only] to its willingness to provide as broad a forum as possible, consistent with its [relevant] mission." See *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788

(1985); cf. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). As the Seventh Circuit held in a related context, "the ballot . . . is in fact not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down." *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982). Hawaii, and other States that do not "count" and "publish" write-in votes for candidates who cannot *legally* hold office, are not required to subsidize the protest speech of those who, however sincerely, believe the range of candidates is too narrow. The States do not violate the Constitution when they exclude speech at the ballot box for ineligible candidates, see *Cornelius*, 473 U.S. at 806, or otherwise refuse " 'to subsidize the exercise of a fundamental right' " to protest, as a general matter, that "none of the above" merit a voter's election day support. See *Rust*, 111 S. Ct. at 1772.

CONCLUSION

For the reasons above and as stated by Respondents, the judgment of the court of appeals should be affirmed.

Dated: Carson City, Nevada, March 2, 1992.

FRANKIE SUE DEL PAIPA*

Attorney General

State of Nevada

*Counsel of Record

KATERI CAVIN

Deputy Attorney General

State of Nevada

Capitol Complex

Carson City, Nevada 89710

(702) 687-4002

Counsel for Amicus

Curiae State of Nevada

(Other Counsel of Record

Listed on Inside Cover)